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No. 82-____

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IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, STATE OF HAWAII,

Petitioner,

v.

ROBERT S. NAKATA, SEIYU NAKATA, CHARLES F. RUPPUN, PAUL REPPUN, CLIFFORD WONG and RACHAEL HALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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QUESTIONS PRESENTED

1. Where the Supreme Court of the State of Hawaii, by reversing, in its 1973 *McBryde v. Robinson*[1] decision, over 100 years of judicial precedent relating to Hawaiian water law, destroyed water rights which the Board of Water Supply of the City and County of Honolulu had purchased for $900,000 in 1955, was property of the Board taken without just compensation in violation of the Due Process Clauses of the Fourteenth Amendment and Fifth Amendment of the Constitution of the United States?

2. In a civil action where Plaintiffs, who were private parties, successfully enjoined water diversion by the Board of Water Supply by using the above-mentioned *McBryde* decision against the Board, did the Board, a semi-autonomous ageny of a home-rule jurisdiction county, have a right to claim that its property was taken without just compensation in violation of the Due Process Clauses of the Fourteenth Amendment and Fifth Amendment of the Constitution of the United States?

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1. 54 Haw. 174, 504 P.2d 1330, *aff'd upon rehearing* 55 Haw. 260, 517 P.2d 26 (1973), *cert. denied* 417 U.S. 976, *appeal dismissed* 417 U.S. 962 (1974).

LIST OF INTERESTED PARTIES

The Plaintiffs in this case were Charles F. Reppun, Paul Reppun, Robert S. Nakata and Seiyu Nakata. Plaintiffs-Intervenors were Clifford Wong and Rachael Hall. On appeal to the Hawaii Supreme Court, all of these parties were Appellees and Cross-Appellants. The sole Defendant in this case was the Board of Water Supply of the City and County of Honolulu, State of Hawaii. On appeal to the Hawaii Supreme Court, the Board was the Appellant and Cross-Appellee.

The scope of this case, involving as it does recent upheaval in Hawaii water law, *indirectly* affects users of surface waters throughout the State of Hawaii. For example, the sugar companies and small farmers who had their water rights destroyed by the *McBryde* decision, after this Court denied certiorari and dismissed their appeal for lack of jurisdiction, instituted an action in federal court where they obtained an injunction against state officials from enforcing the *McBryde* decision against them. *Robinson v. Ariyoshi,* 441 F. Supp. 559 (D. Hawaii 1977). This case was appealed by the State of Hawaii to the Ninth Circuit. The Ninth Circuit, using an appropriate rule of the Hawaii Supreme Court, certified various questions of state law to the Hawaii court to be answered. These questions were answered by decision dated December 29, 1982 reported at 65 Haw. _____, 658 P.2d 287 (1982). A Motion for Reconsideration on this most recent dicision of the Hawaii court is presently pending before the Hawaii Supreme Court, and, of course, a Ninth Circuit decision on the district court's *Robinson* decision will be pending for quite some time to come.

Because of the proceedings taking place in the *Robinson* case in federal and state courts and because of the extensive public interest involved in the case at bar, the Board will consider the State of Hawaii as an interested party pursuant to 28 U.S.C. 2403(b).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner, Board of Water Supply, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Hawaii in this proceeding.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and Order of the trial court are unreported. The decision of the Hawaii Supreme Court in this case is reported at 65 Haw._____, 656 P.2d 57 (1982). The Hawaii Supreme Court denied the Board's Motion for Reconsideration without argument by Order Denying Motion for Reconsideration dated January 24, 1983, and Judgment on Appeal was filed by the Hawaii Supreme Court on February 10, 1983. The trial court's Findings, Conclusions and Order (A1-A15) and the Decision (A16-A50), and Judgment (A51-A52) of the Hawaii Supreme Court are reprinted in the attached Appendix.

JURISDICTION

The decision of the Hawaii Supreme Court was filed on December 20, 1982. A timely Motion for Reconsideration was filed by the Board and denied by Order Denying Motion for Reconsideration filed January 24, 1983. Judgment on Appeal was filed February 10, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND CHARTER PROVISIONS

U. S. Constitution, Amendment V A53

U. S. Constitution, Amendment XIV, Sec. 1 A53

Hawaii State Constitution, Article VIII, Secs. 1 and 2 (relating to home rule provisions for the City and County of Honolulu) A53

Revised Charter of the City and County of Honolulu (1973), Article VII (relating to the establishment of the Board of Water Supply) A54

Hawaii Revised Statutes, Sec. 7-1 (relating to water rights) A59

Stat. L. of Kamehameha III 81 *et seq.*, reprinted Rev. L. Haw. (1925), Vol. II, Appendix 2124, 2128, being the "Principles Adopted by the Land Commission," and the Resolution of Legislative Council, dated October 26, 1846 approving the Principles. (Predecessor of H.R.S. 7-1) A59

Pursuant to Rule 15.1(f) of the Rules of this Court, the text of the foregoing constitutional provisions, statutes and charter provisions is set forth in the attached Appendix.

STATEMENT OF THE CASE

In 1973, the Hawaii Supreme Court in its *McBryde* (*see* page i for the full case citation) decision reversed over 100 years of judicial precedent in Hawaii water law. The reversal was sudden and unexpected and a radical departure from previous Hawaii water law. The parties to the case had neither asked for, nor argued about, nor expected the change. *THE MOST IMPORTANT POINT* to consider is that *McBRYDE DID REVERSE PRIOR LAW*. If it had not reversed prior law, the parties in *McBryde* who later obtained a federal court injunction in *Robinson*, 441 F. Supp. 559 (D. Hawaii 1977), would have had no federal issue - no claim that *vested* rights had been destroyed. In his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 296-297 (1967) (cited with approval in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1977)), Justice Stewart stated that this Court did not have to defer to a state court decision on local property law "to the extent that it constitutes a *sudden change* in state law, *unprecedented in terms of the relevant precedent.*" (Emphasis added.) Property rights become *vested* by the very passage of time and consistency of judicial precedent. The reason the Board emphasizes the point that *McBryde* reversed prior law at this point in the Petition is that all else hinges on it, including the recent attempt by the Hawaii Supreme Court, as discussed below, to claim that prior Hawaii water law was actually "unsettled."

Under Hawaii water law prior to *McBryde*, "surplus waters" of a stream (basically meaning the stream flow minus various types of prescriptive rights and statutorily created riparian rights unique to Hawaii water law) could be purchased and conveyed out of the watershed of their origin. The statutorily created riparian rights were of little significance in Hawaii, basically associated with domestic use as guaranteed by Hawaii Revised Statutes, Sec. 7-1. Relying on this judicially established water law, the predecessor to the Board purchased surplus water and prescriptive and riparian rights and associated watershed land in Waihee and Kahaluu Vallies on the island of Oahu for $900,000. In the following twenty years, the Board spent millions of dollars developing its water rights in Waihee for the use of the public on the Windward side of the island of Oahu where the water was located.

In 1976, the Plaintiffs who were farmers in Waihee, relying on the 1973 *McBryde* decision, sought an injunction against diversion of water from Waihee by the board claiming that they had insufficient water to cultivate their crops. In drastically altering Hawaii water law, *McBryde* had totally eliminated the concept of "surplus water," had ruled that ancient prescriptive and riparian rights could not be severed from the lands to which they were appurtenant and separately conveyed, that no surface water could be conveyed out of the watershed of origin and appeared to say that riparian rights were far more extensive than domestic use rights.

The trial court, relying on *McByde,* ruled that the deed by which the Board's successor had obtained surplus, prescriptive and riparian water was a *nullity* and that the Plaintiffs had substantial riparian water rights which they could use for agricultural operations for profit. The trial court specifically rejected the Board's constitutional argument that its property was being taken without just compensation in violation of the Due Process Clauses of the Fourteenth Amendment and Fifth Amendment of the United States Constitution. The trial court granted an injunction that required the Board to permit Waihee Stream to flow at no less than 2.7 million gallons per day, thereby seriously affecting the Board's operations in Waihee and severely hampering the existing and future planned development of water in Waihee. If the deed by which the Board had acquired water rights had not been declared a nullity, and if water law as it existed prior to *McBryde* had prevailed, no such injunction would have been possibile. The water in Waihee Stream would have been the Board's to do with as it saw fit.

These basic rulings of the trial court were upheld by the Hawaii Supreme Court on appeal in this case. The Hawaii Supreme Court reaffirmed its *McBryde* decision, although modifying it to some extent. The modifications did not result in the Board's saving its previously acquired water rights. In answer to the Board's argument that its property was being taken without just compensation by the application of the *McBryde* decision to it, the Hawaii Supreme Court ruled (in footnote 9) that no "usurpation of private rights by the public" was at issue so no "taking" could occur. All that was salvaged of the Board's previously

acquired water rights was a ruling that the Board could continue to use water which had already been dedicated to "public use."

The Board asks this Court to review this destruction of its water rights.

REASONS FOR GRANTING THE WRIT

I. AN INTOLERABLE CONFLICT BETWEEN STATE AND FEDERAL JURISDICTIONS HAS OCCURRED IN HAWAII.

As mentioned above, the Hawaii federal district court in *Robinson* enjoined state officials from enforcing *McBryde*. The federal court ruled that *McBryde* had denied the parties both procedural and substantive due process - procedural due process was denied because the Hawaii Supreme Court had changed Hawaii water law *sua sponte* never having given the parties a chance to argue that their property had been taken thereby, and substantive due process was denied because *McBryde* had destroyed vested rights of the parties. Also, as mentioned above, the federal court *Robinson* decision is presently on appeal to the Ninth Circuit with certified questions from the Ninth Circuit to the Hawaii Supreme Court also presently pending on Motion for Reconsideration. The Hawaii court's answers to the Ninth Circuit's certified questions will hereafter be referred to as *Robinson* (State).

Obviously, whatever the outcome of the Ninth Circuit case, *Robinson* will eventually be appealed to this Court. Meanwhile, the Board is "caught in the middle" between the state and federal court battle with its property devastated and its operations impaired. The Hawaii courts are completely ignoring the federal court's *Robinson* decision in favor of *McBryde*. The Board is concerned that even though this Court may feel that this case is appropriate for granting of certiorari, it may decide to wait for the *Robinson* case to reach it and deny certiorari in this case. This would merely complicate an already tense and tortured situation and probably entail a federal court action by the Board. Also, as explained below, there is a good chance the *Robinson* (State) decision succeeded in avoiding a present confrontation on the constitutional issues raised by the parties in *Robinson*. If this is true, a case attempting to resolve the problems in Hawaii may have to wait for years to reach this Court while the disruption of water law in Hawaii continues. The Board urges this Court to

consider the approach of granting certiorari in this case with the idea of later consolidating this case with *Robinson* or at least considering this case and *Robinson* at the same time (if *Robinson* reaches this Court).

The very conflict between state and federal jurisdictions places this case in a classic posture for the granting of certiorari by this Court. It will eventually take a decision by this Court to resolve the tangled mess *McBryde* and *Robinson* have created. For a closely related reason, the Board believes this Court granted certiorari in *Summa Corporation v. California* (that case also involves a sudden change in judicial precedent regarding California property law and a conflict with federal law in the form of a treaty).

It is true that the federal-state conflict in Hawaii does not yet involve the decision of a federal appeals court, but this point does not seem to ease the tension in Hawaii. *McBryde* is not the only case involving the Hawaii Supreme Court's *sua sponte* attempt to radically alter Hawaii property law without being willing to pay the price for destroyed property rights. *See County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973). The property owner in *Sotomura*, like the property owners in *McBryde*, ran to federal district court in Hawaii, and the federal court enjoined state officials from enforcing the Hawaii Supreme Court's *Sotomura* decision. *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978). Petitioner is informed that the federal court case would have been appealed by the State but for a missed appeal deadline.

Needless to say, the courts in Hawaii need guidance and direction from this Court. And this case extends beyond Hawaii as well. As water becomes more and more scarce, especially in the Western United States, efforts to regulate water will continually meet the vested rights problem whether water law is sought to be changed by judicial precedent or legislative action. All the states need the guidance of this Court on this issue. Also, Hawaii itself is required by a recent amendment to its State Constitution to adopt a water code. This is virtually impossible to do while water law is so unsettled. Again, direction from this Court on the constitutional issues is sorely needed.

II. THE SUBSTANTIAL FEDERAL QUESTION OF THE EXTENT TO WHICH COURT ACTION CAN BE CONSIDERED A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IS RAISED IN THIS CASE.

The "taking" issue in this case is not raised by executive or legislative state action but by *judicial state action.* Even the Hawaii Supreme Court in its *Robinson* (State) decision recognized that such action can constitute a taking:

> State judicial action may, of course, constitute state action violative of the Fourteenth Amendment of the United States Constitution. *Shelly v. Kraemer,* 334 U.S. 1 (1948). Inasmuch as the Fifth Amendment limitation on govermental takings has been extended to the states via the Fourteenth Amendment, a judicial determination could arguably constitute a taking of private property without just compensation. *Hughes v. Washington,* 389 U.S. 290, 294 (1967) (Steward, J. concurring). *Robinson* (State), 658 P.2d, at 300.

The Hawaii Supreme Court goes on to say in its *Robinson* (State) decision that *McBryde* did not address the "question of whether the cessation of any particular diversion would in fact constitute a 'taking.'" 658 P.2d, at 305. For a state court attempting to avoid federal court confrontation, this is a masterful stroke. The State will eventually return to the Ninth Circuit after the certification proceedings are terminated and say, "See, all *McBryde* did was define the scope of water rights in a new way. The issue of the appropriateness of enjoining any particular diversion as against a 'taking' argument is not ripe for decision because we're not trying to do that yet!" For this reason, the *Robinson* case may die on the vine in federal court awaiting some future state litigation where the State will be attempting to enjoin the property owners and water diverters who are the present parties in *McBryde* and *Robinson.* Again for this very reason, it is all the more important that this Court grant certiorari in this case. The Board had its chance to object to the injunction of a particular diversion of water based on the old Hawaii law, and the Hawaii Supreme Court did not find a "taking." (In fact, the Hawaii court never even got that far - it held that no "taking"

issue was raised because the Board's suit was between private party plaintiffs and a governmental agency defendant therefore no taking of private property by the government was involved. This issue is discussed in the next section of this Petition.)

The United States appears to be entering a period of decentralization. On a national political level, the federal government is turning programs and duties back to the states and deregulation on a national level is taking place. The states are moving into a period of "feeling their oats" as are political subdivisions of the states with home rule jurisdictions on the increase (as in Hawaii - the counties here are fiercely independent and resist state interference in their activities as much as possible). The Board predicts we will see states grabbing up power and property in all possible ways to assist them in their added duties.

This is also an age of "wronged people." Everyone wants reparations for all the perceived wrongs against them of the past. Eskimos want reparations, indians want reparations, Hawaiians want reparations, states want reparations. The entire *McBryde* fiasco has the flavor of a "righted wrong." In its most recent *Robinson* (State) decision, the Hawaii Supreme Court refers to the fact that all justices who sat on the Hawaii Supreme Court before statehood did not really represent the people of the State and that the territorial judges were really only "federal judges." 658 P.2d, at 306 (fn. 25). This sentiment is even more fully set out in an article from which the Hawaii Supreme Court cites extensively in its *Robinson* (State) case, Van Dyke, et al; *Water Rights In Hawaii*, pp. 143-144, 153-176 (1979). The article argues that Hawaii's Supreme Court justices were essentially pawns of the sugar companies leading Hawaii water law in the sugar companies' direction. This is dangerous talk. Regardless of the truth of the sense conveyed by the footnote and the article, there is a rule of private property ownership in the United States which protects property from taking without due process of law and just compensation. State courts cannot set social policy or attempt to correct perceived past injustices in violation of the rule, regardless of the desireability of the social policy sought.

One of the ways states will take property and power and attempt to "right wrongs" will be by use of judicial state action. The *McBryde* case is a good example. It has been a long time since this Court took the opportunity to set limits on taking by

state judicial action. To some extent, it may do so in the *Summa Corporation* case. To an even greater extent it can do so in this case, and it should take the opportunity to do so at this early stage of revived states' rights.

In this case, one of the most critical issues the Court will have to decide if it grants certiorari is whether and to what extent there was a "sudden, unexpected change" in Hawaii water law. This is a *federal question* as far as the taking issue is concerned. In other words, even if the Hawaii Supreme Court or the advocates of *McBryde* try to claim that *McBryde* was not "sudden and unexpected" or that *McBryde* merely clarified "unsettled" law, this Court will have the duty to make an independent investigation of this question. If it did not have such a duty, then there would be no check on state courts whatsoever - they would always say that they are merely construing "unsettled" law, no matter how unreasonable the claim may be. This is the reason the Board stressed at the outset of this Petition that *McBRYDE DID REVERSE PRIOR LAW*. It did not merely construe "unsettled" law. In *McBryde* the Hawaii Supreme Court *specifically stated* that it was overruling prior law. 54 Haw., at 191 and 200. Of course, now that a great federal-state court battle has arisen on this point, the Hawaii Supreme Court has tried to muddy the waters and claim that prior Hawaii law was not really settled. *Robinson* (State); 658 P.2d, at 305-312. Although the issue of whether prior Hawaii water law was settled is obviously not one to be determined by this Court on a Petition for Certiorari, the Board believes that it is *the important issue* to which this Court should be alerted.

III. THE SUBSTANTIAL FEDERAL QUESTION OF WHETHER OR NOT THE BOARD OF WATER SUPPLY HAS A RIGHT NOT TO HAVE ITS PROPERTY TAKEN WITHOUT JUST COMPENSATION IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IS RAISED IN THIS CASE.

In footnote 9 of its opinion in this case, the Hawaii Supreme Court disposed of the taking issue raised by the Board both at trial and on appeal by merely saying that the issue did not exist.

> The BWS argues that any application of *McBryde* to this case holding the transfer of water rights void would constitute a 'taking' in violation of the Fifth Amendment of the United States Constitution. Under the circumstances of this case we do not agree that a fifth amendment issue is raised.
>
> The Fifth Amendment of the Constitution provides that 'No . . . private property [shall] be taken for public ue, without just compensation.' At issue in this case are the rights to use of private parties who claim an interest in property rights claimed to be held by an agency of the government. The ostensible usurpation of private rights by the public is not at issue.

It is not clear whether the Hawaii court was trying to say that because the plaintiffs were not state officials, therefore no taking by government was involved or that because the Board was an agency of government, therefore no "private property" was involved. In either case, the Court missed the point. No governmental agents or entities were parties in *Shelly v. Kraemer*. The point was that the *court itself* as the *third* actor in the litigation was the governmental entity acting improperly. Likewise, in this case the enforcement of the *McBryde* principles by the Hawaii courts against the Board, regardless of what type of plaintiff asserted them, be they private or governmental, to the extent that *McBryde* destroyed vested rights of the Board, constituted illegal state action and amounted to improper taking of the Board's property. In effect, the issue is the same as was raised in the previous part of this Petition.

If the Hawaii Supreme Court was trying to say that the Board had no right to protect against a "taking" because it was a governmental agency and therefore no "private" property was taken, the Board strongly disagrees and believes that this Court

should affirm the Board's right to protection. This is especially true since the Board is a semi-autonomous agency of a home-rule jurisdiction county. (Hawaii State Constitution, Article VIII, Secs. 1 and 2, Revised Charter of the City and County of Honolulu (1973), Article VII) Although the Board is not aware of any decision from this Court on point, the general rule is stated with appropriate citations in 16A Am. Jur., Constitutional Law, Sec. 826:

> In jurisdictions in which the right to local self-government is treated as a right inherent in cities and towns, and one which if not surrendered on the adoption of the state constitution, cannot be taken away by the legislature, the due process guarantee applies to municipal corporations, at least as to its proprietary functions.
>
> The right of home rule by cities has been established in a number of states by constitutional provision. A home-rule city is protected by the due process guaranty.

For the very reason that there is no decision of this Court on point, the Board invites this Court to take this opportunity to recognize due process protection for the Board. The Board is essentially an independent corporation - it receives revenue directly from its users, it is controlled by its own board of directors which operates independently from the city council and it has private party bond-holders who are injured when the Board's property is destroyed. Again, as noted above, in this area of decentralization, where political subdivisions of states have acquired greater rights of independence under state constitutions, the Board urges this Court to acknowledge the Board's right, and the rights of all its brothers and sisters across the country who have similar independence, to protect their property and not be treated like second-class constitutional citizens.

IV. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and decision of the Hawaii Supreme Court in this case.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CHARLES F. REPPUN, PAUL REPPUN, ROBERT S. NAKATA, and SEIYU NAKATA, *Plaintiffs,* *and* CLIFFORD WONG and RACHEL HALL, *Plaintiffs-Intervenors* *vs.* BOARD OF WATER SUPPLY, City and County of Honolulu, *Defendant.*	Civil No. 50121 FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial on February 12, 13 and 14, 1979, and Plaintiffs CHARLES F. REPPUN and PAUL REPPUN (hereinafter referred to as "Plaintiffs REPPUN") being represented by their attorneys Ronald Albu and Allene Richardson, Plaintiffs ROBERT S. NAKATA and SEIYU NAKATA and Plaintiffs-Intervenors CLIFFORD WONG and RACHEL WONG (hereinafter referred to as "Plaintiffs NAKATA", "Plaintiff WONG" and "Plaintiff HALL" respectively), being represented by their attorney E. Cooper Brown, and Defendant BOARD OF WATER SUPPLY (hereinafter referred to as "BOARD") being represented by its attroney Deputy Corporation Counsel Samuel P. King, Jr., and the Court having considered the records and files in this case, the testimony of witnesses and other evidence submitted at trial, the facts observed on the Court's visit to Waihee and to Plaintiffs REPPUN's, NAKATA's, WONG's and HALL's taro farms on the afternoon of February 13, 1979, and the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. PARTIES

1. Plaintiffs REPPUN, NAKATA, WONG and HALL are citizens of Hawaii. All of said Plaintiffs grow taro in the ahupuaa of Waihee on the island of Oahu, and the Plaintiff WONG also grows taro in the ahupuaa of Kahaluu on the island of Oahu (said ahupuaas will hereinafter be referred to as "Waihee" and "Kahaluu").

2. The BOARD is a duly authorized department of the City and County of Honolulu, a municipal corporation of the State of Hawaii. The BOARD is empowered, and has been so empowered at all times relevant to this action, to construct, operate and maintain the water systems of the City and County of Honolulu and acquire property and water rights for the City's water systems.

II. PROPERTY INTERESTS OF PARTIES IN WAIHEE

A. GENERAL TITLE HISTORY OF WAIHEE PROPERTIES

3. The title to all of the parcels in Waihee involved in this action derive from Government and Crown lands. All Government lands awarded by the Mahele under the laws of 1848 were subject to the following reservations:

> Made over to the Chiefs and People, by our Sovereign Lord King and we do hereby declare those lands to be set apart as the lands of the Hawaiian Government subject always to the rights of tenants . . .

Similarly, the Crown lands were set aside with the following provisions:

> To be the private lands of His Majesty Kamehameha III, to have and to hold to himself, his heirs, and successors, forever; and said land shall be regulated and disposed of according to his royal will and pleasure subject only to the rights of tenants.
>
> (*See* Indices of Awards made by the Board of Commissioners to Quiet Lands Titles In The Hawaiian Islands, pp. 28 and 45.)

4. Bishop Trust Company, Limited, as Trustee for Kahaluu Land Trust (hereinafter referred to as "Bishop Trust") acquired title to Government and Crown Lands in Waihee, including the

property presently owned or leased by Plaintiffs in Waihee, by decree of the Land Court in Application (L.C.A.) No. 1133. (Exhibit H. *See also,* Exhibits A, B, C, D, E, F, and G.) L.C.A. 1133 included the entire ahupuaa of Waihee except for designated Exclusions (Exhibits JJJ and KKK).

B. PROPERTY INTERESTS OF PLAINTIFFS NAKATA IN WAIHEE

5. In 1941, land including the parcel of land in Waihee now farmed by Plaintiffs NAKATA was conveyed by Bishop Trust to Thomas Higa, the predecessor-in-interest of the present owner, T & S, Inc. The 1941 deed contained a restriction limiting the water rights associated with the parcel as follows:

> And also TOGETHER WITH the following water rights:
>
> the right to take from the streams and ditches from the Grantor sufficient water to irrigate taro and other crops actually growing at any time on such land, but not to exceed 30,000 gallons per acre per day for not more than 4.85 acres that is to say, a total of 145,500 gallons per day of 24 hours; the right to take from the streams and ditches of the Grantor water sufficient for domestic purposes on the granted premises and for the watering of any livestock that may be on the granted premises; the right to take from the streams and ditches of the Grantor not more than 5,000 gallons per day for irrigation of crops on any portion of the granted premises other than the 4.85 acres of wet land, it being understood and agreed that the foregoing granted water rights constitute all the water rights to which the granted premises are or shall be entitled under or by reason of this deed;
>
> (Exhibits N and O.)

6. Of the 4.85 acres referred to in the above-cited restriction, only about half, or 2.425 acres, are included in the parcel presently farmed by Plaintiffs NAKATA is leased by them under unrecorded lease from T & S, Inc., which terminates on December 31, 1979.

7. Said land farmed by Plaintiffs NAKATA is leased by them under unrecorded lease from T & S, Inc., which terminates on December 31, 1979.

8. Said land leased by Plaintiffs NAKATA is identified as Lot L-3-A-2-A as shown on Map 68, L.C.A. 1133. (Exhibit 2)

9. Located wholly within said Lot L-3-A-2-A is Exclusion 14 as shown on Map 2, L.C.A. 1133. (Exhibit KKK) This lot is also leased by Plaintiffs NAKATA under an unrecorded lease.

10. Exclusion 14 consists entirely of Land Commission Award 7643, Apana 4. (L.C.Aw. 7643:4) (Exhibit 9)

11. Located within the boundaries of Lot L-3-A-2-A are L.C. Aw.'s 4141:1, 7688:1, 7689:1 and 7717:1 & 2. (Exhibits 5, 6, 7 and 8)

12. At the time L.C.Aw.'s 4141:1, 7643:4, 7688:1 and 7789:1, 7717:2 was awarded by the Land Commission, taro was cultivated on these parcels in the amounts of 0.75, 0.20, 0.75, 1.4 and 0.31 acres respectively, a total of 3.41 acres.

13. L.C.Aw.'s 4141:1, 7688:1, 7789:1 and 7717:2 are subject to the restriction on water rights cited in paragraph 5 above. L.C.Aw. 7643:4 is not subject to any restrictions on water rights.

14. Waihee Stream flows along a portion of the mauka boundary of Lot L-3-A-2-A and through said Lot exiting at its makai boundary.

15. Waihee Stream does not flow along any boundray of or through Exclusion 14.

C. PROPERTY INTERESTS OF PLAINTIFFS HALL AND WONG IN WAIHEE

16. On March 13, 1950, Bishop Trust conveyed by deed interest in property it owned in Waihee to Kahaluu Company, Ltd. subject to the following restriction on water rights:

> Said parcels FIRST to TENTH, inclusive, being SUBJECT to a grant, in favor of Koolau Company, Ltd., of all rights to water having its source upon or flowing under or over the said lands, and all easements or rights in the nature of easements to the continuous or interrupted flow of water, ditches and auwais on said lands as set forth in that certain deeds of the Grantor to said Koolau Company, Ltd., dated March 13, 1950, and recorded in said Bureau of Conveyances in Book_____, Page_____.

Parcel SECOND, as described in said deed, included the property presently owned by Plaintiffs HALL and WONG and WONG's parents in Waihee. (Exhibit I)

17. As referred to in said deed to Kahaluu Company, by deed of the same date, all water rights in said property were conveyed to Koolau Company, Ltd. In addition, the deed to Koolau Com-

pany conveyed all water rights owned by Bishop Trust in the ahupuaas of Waihee [L.C.A. 1133] and Kahaluu [L.C.A. 979] to Koolau Company as follows:

> 1. ALL the right, title and interest of the Grantor to water having its source upon or flowing under or over the land covered by Land Court Application No. 1,133 of the Grantor and Land Court Application No. 979 of Bishop Trust Company, Limited, and all lands designated as parcels THIRD to TENTH, inclusive, in that certain deed of the Grantor to Kahaluu Company, Ltd., dated March 13, 1950, and recorded in the Bureau of Conveyances at Honolulu as aforesaid in Book 2326, Pages 379-394, and all easements or rights in the nature of easements to the continuous or interrupted flow of water, ditches and auwais on said lands.

Koolau Company also received by this same deed the watershed area at the top of Waihee Valley, designated as parcel SECOND in the deed and described as:

> Lot E, as shown on Sheets 1 & 2 on file in the Office of said Assistant Registrar of the Land Court with Land Court Application No. 1,133 . . . .

18. Plaintiff HALL acquired Lot 17-A-2-B as shown on Map 51, L.C.A. 1133 (Exhibit 3), which she presently owns in Waihee, by mesne conveyances from Kahaluu Company Ltd. (Exhibits J, K, L and M) This lot is subject to the conveyance of water rights described in paragraphs 16 and 17 above.

19. Plaintiff HALL also owns the property designated as Exclusion 13 on Map 2, L.C.A. 1133 (Exhibits 26 and KKK). Exclusion 13 is located wholly within the boundaries of Lot 17-A-2-B. Exclusion 13 is not subject to restriction of any water rights associated with the parcel.

20. Plaintiff HALL leases Exclusion 12 as shown on said Map 2, L.C.A. 1133. Exclusion 12 is a rectangular parcel bordered on three sides by Lot 17-A-2-B. (Exhibit 27 shows this property subject to Plaintiff HALL's lease) Exclusion 12 is not subject to restriction of any water rights associated with the parcel.

21. Exclusion 12 consists entirely of L.C.Aw. 10430:2. (Exhibits 12, 13, 13A, 14 and 15)

22. Exclusion 13 consists entirely of L.C.Aw. 7643:2. (Exhibit 9)

23. Located with the boundaries of Lot 17-A-2-B are L.C.Aw.'s 4141:2, 7698:1 and 8186:1. (Exhibits 5, 10 and 11)

24. At the time L.C.Aw.'s 4141:2, 7643:2, 7698:1, 8186:1 and 10430:2 were awarded by the Land Commission, taro was cultivated on these parcels in the amounts of 2.42, 0.25, 0.15, 0.56 and 0.50 acres respectively, a total of 3.88 acres.

25. Waihee Stream flows along a portion of the mauka boundary of Lot 17-A-2-B and through said lot exiting at its makai boundary.

26. Waihee Stream does not flow along any boundary of or through Exclusions 12 and 13. Evidence regarding whether Waihee Stream flowed along or through Exclusion 13 was inconclusive.

27. Lot 17-A-2-B receives water, in part, by way of an auwai which intercepts Waihee Stream on land located above said lot in Waihee Valley. (Exhibit 1)

28. Plaintiff WONG acquired Lot 15 as shown on Map 8, L.C.A. 1133 (Exhibit 4), which he presently owns in Waihee, by mesne conveyances from Kahaluu Company, Ltd. (Exhibits Q, R, S and T)

29. Plaintiff WONG acquired a portion of Exclusion 10 as shown on Map 2, L.C.A. 1133 (Exhibit KKK) by mesne conveyances from Kahaluu Company, Ltd. (Exhibit I, parcel SEVENTH)

30. Plaintiff WONG's parents acquired Lot 3 as shown on said Map 8, L.C.A. 1133, which they presently own in Waihee, by mesne conveyances from Kahaluu Company, Ltd.

31. Said Lots 15 and 3 and the portion of Exclusion 10 owned by Plaintiff WONG are subject to the conveyance of water rights described in paragraphs 16 and 17 above. None of these parcels contains any Land Commission Awards.

32. Waihee Stream flows along the northern (Kahuku) boundaries of Lots 3 and 15.

33. For agricultural purposes, Lot 15 receives water via an auwai that intercepts Waihee Stream on Plaintiff HALL's property. Excess water flows out of Lot 15 into Plaintiff WONG's parents' lot in Kahaluu. (Exhibit 1)

C. PROPERTY INTERESTS OF BOARD IN WAIHEE

34. On April 15, 1954, the City and County of Honolulu, as predecessor-in-interest to the BOARD, filed a condemnation action to acquire all the water rights in Waihee in Circuit Court case L-23515. The City also sought to acquire the watershed area in Waihee in this action. (Exhibit 55, pp. 17-20)

35. The City eventually filed a discontinuance in the action and on October 6, 1955, acquired by deed, in lieu of condemnation, all water rights and property (including watersheds) owned by Koolau Company, Ltd. in the ahupuaas of Waihee and Kahaluu. (Exhibit Z) The water rights and property owned by Koolau Company, Ltd. had been acquired by it by deed from Bishop Trust. (*See* paragraph 17 above and Exhibit Y)

36. By this deed, the City acquired all water rights originally owned by Bishop Trust in the ahupuaas of Waihee and Kahaluu, including the konohiki water rights in both ahupuaas and the appurtenant water rights to the following Land Commission Awards in Waihee: L.C.Aw.'s 2070:1 and 2, 2246Q:1, 2304:1, 2305:2, 2311:1, 2 and 3, 4141:1 and 2, 7643:1, 7688:1 and 3, 7689:1 and 2, 7691, 7692:1, 7698:1, 2, 3 and 4, 7701:1, 2 and 3, 7717:1, 2 and 3, 8186:1 and 2, 8216:1, 2 and 3, 10123:1, 2 and 3, and Mahele Award No. 8. (Exhibits H and Y)

37. At the time L.C.Aw.'s 2070:1, 2246Q:1, 2304:1, 2305:2, 2311:1 and 2, 4141:1 and 2, 7643:1, 7688:1, 7689:1, 7691, 7692:1, 7698:1, 2 and 4, 7701:1 and 2, 7717:1 and 2, 8186:1, 8216:1 and 2, 10123:1 and 2, and Mahele Award No. 8. were awarded by the Land Commission, taro was being grown on these parcels in the amounts of 0.118, 1.13, 1.14, 1.05, 0.65, 0.70, 2.58, 0.75, 1.00, 0.75, 1.40, 1.42, 1.43, 2.42, 0.80, 0.90, 1.078, 1.667, 0.178, 0.31, 0.56, 2.20, 1.25, 1.01, 1.18 and 7.88 acres respectively, a total of 35.5418 acres. (Exhibits CC, DD, EE, FF, GG, 5, HH, 6, 7, II, JJ, 10, KK, 8, 11, LL, MM and NN) This list of L.C.Aw.'s includes all L.C.Aw.'s located within parcels presently owned by Plaintiffs in Waihee except L.C.Aw.'s associated with Exclusions 12, 13 and 14.

38. The BOARD also acquired a Waihee parcel by condemnation in Civil No. 5836 (Exhibit BB) consisting of L.C.Aw.'s 2246-R.1 and 2 and 8178. (Exhibits OO and PP) These L.C.Aw.'s consist of 2.08 acres of land which was in taro at the time of the Land Commission awards of the properties.

39. The BOARD also acquired Lot L-2-A-1 from Yeisuke Higa in Waihee. (Exhibits AA and MMM)

40. Waihee Stream originates in the watershed area owned by the BOARD in Waihee and flows through Lot L-2-A-1.

III. PROPERTY INTERESTS OF PARIES IN KAHALUU

41. Plaintiff WONG's parents own a parcel of land located in Kahaluu identified as Tax Map Key No. (TMK) 4-7-26-2. This parcel, as shown in Exhibit 1, shares a boundary with WONG's

parents' Waihee Lot 3 (Described in paragraph 30 above). This boundary is part of the line separating the ahupuaas of Waihee and Kahaluu.

42. Plaintiff WONG's parents lease lots located within the boundaries of their Kahaluu parcel. The leased lots are identified as TMK's 4-7-26-4 and 5 owned by Louise Hookano and Leahi Co., Ltd., respectively.

43. Located within the boundaries of TMK 4-7-26-2 are L.C.Aw.'s 2168, 2234-G:3 and 4, 2246-H:2, and 6948:1. (Exhibit 16)

44. TMK's 4-7-26-4 and 5 consist entirely of L.C.Aw.'s 2246-D:2 and 2234-G:1 (L.C.Aw. 2234-G:1 is the same as L.C.Aw. 2240-B:1) respectively. (Exhibit 16)

45. At the time L.C.Aw.'s 2168, 2234-G:1, 3 and 4, 2246-D:2, 2246-H:2, and 6948:1 were awarded by the Land Commission, taro was cultivated on these parcels in the amounts of 2.26, 1.10, 0.36, 0.44, 1.00, 0.32 and 1.70 acres, respectively, a total of 7.18 acres.

46. TMK 4-7-26-5 (L.C.Aw. 2234-G:1) is subject to a grant of all water rights in favor of Koolau Company, Ltd. (Exhibits XX and YY) which water rights were acquired by the City and County of Honolulu from Koolau Company by the deed referred to in paragraph 34 above.

47. TMK's 4-7-26-2 and 4 are not subject to any restrictions on water rights.

48. Waihee Stream flows along TMK 4-7-26-2 only at its makai boundary and does not touch this lot at any other point. TMK 4-7-26-2 lies wholly below Waihee Stream in elevation except at its makai boundary.

49. Waihee Stream does not flow along or through TMK's 4-7-26-4 or 5. TMK's 4-7-26-4 and 5 lie wholly below Waihee Stream in elevation.

50. TMK 4-7-26-2, 4 and 5 receive water via an underground pipe which intercepts Waihee Stream on Plaintiff WONG's parents' Lot 3 in Waihee. The pipe runs across the mauka end of Lot 3 across the line dividing the ahupuaas of Waihee and Kahaluu into TMK 4-7-26-2.

IV. AGRICULTURAL OPERATIONS OF PLAINTIFFS

51. Exhibit 1 shows the location of Plaintiffs' farms and the manner in which water is transported from Waihee Stream to each farm. The green areas on Exhibit 1 indicate areas Plaintiffs

claim could be put into taro cultivaton. The area on which taro is presently grown is significantly smaller.

52. Plaintiffs NAKATA grow taro and bananas on the property leased by them. They are presently growing approximately 1.5 acres of taro. Water is transported to the taro patches via an auwai which intercepts Waihee Stream at the mauka edge of Plaintiffs NAKATA's farm.

53. Plaintiff HALL grows approximately 3 acres of taro on the parcels she owns and leases in Waihee. No taro is grown on Exclusion 13. Water is transported to the patches Plaintiff HALL presently cultivates via an auwai which intercepts Waihee Stream outside HALL's property several thousand feet up the valley. Water is diverted at this point by means of an earth, rock and scrap wood dam covered with plastic which causes Waihee Steam to pond and back up into Plaintiff HALL's awai.

54. In 1976, Plaintiff HALL suffered taro crop losses for the first time due to taro rot disease. During the summer of 1976, Waihee Stream's average flow was 2.03 million gallons per day (mgd.) (Exhibit HHH) (All stream flows are measured at USGS Gage 16284200 located in Waihee Stream above Plaintiff HALL's auwai intake point.)

55. Taro rot is a fungus called pythium, which attacks the roots and corm of the taro plant and rots the taro rendering the plant useless for harvesting and sale. There is insufficient evidence to show whether or not pythium existed in Hawaii at the time of the Mahele.

56. Plaintiff WONG presently manages taro production on his parents' Kahaluu lot, TMK 4-7-26-2. He is presently growing approximately 8 acres of taro on said lot. Water is transported to this lot via an underground pipe which intercepts Waihee Stream on Plaintiff WONG's parents' Waihee Lot 3 as described in paragraph 49 above. Water is diverted into this pipe by means of a dam which consists of boulders and rocks piled up across the stream at the pipe's intake point.

57. In 1975, Plaintiff WONG first experienced taro rot problems in his taro patches. In the summer of 1975, Waihee Stream flowed at an average rate of 2.28 mgd. (Exhibit HHH)

58. In the summer of 1977, the average flow in Waihee Stream was 2.04 mgd. (Exhibit HHH) Plaintiffs WONG and HALL both continued to suffer taro rot problems. Plaintiff WONG took two acres of taro out of production in 1977 and Plaintiff HALL discontinued cultivation in four out of fifteen of her taro patches.

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59. In August of 1977 this Court issued an injunction requiring the BOARD to leave a minimum of 2.3 mgd. of water flowing in the Waihee Stream.

60. In the summer of 1978 the average stream flow of the Waihee Stream was 2.5 mgd. (Exhibit HHH)

61. During 1978 Plaintiff WONG continued to suffer taro rot disease problems in an additional two acres of his farm and he was only able to successfully cultivate eight out of a total of twelve acres of taro land. In order to cultivate the eight acres, the crop cycle had to be changed in order to prevent the maturation of the crops during the summer period. During 1978 Plaintiff HALL also experienced taro rot in an additional taro patch so that she was only able to successfully cultivate taro in ten out of her fifteen patches. Plaintiffs REPPUN also planted taro in 1978 on a portion of Plaintiff HALL's property, and one of their four patches presently has taro rot problems.

62. Plaintiffs NAKATA have not had problems with taro rot in their taro patches.

63. Plaintiffs contend that they have experienced taro rot problems due to decreased flow in Waihee Stream which has resulted from the BOARD's extraction of water from Waihee Valley. The Court finds that the existence of taro rot in Plaintiffs' taro patches is related to decreased flow of water in Waihee Stream.

64. The Court finds that under the present water management system employed Plaintiffs under presently existing conditions, a 2.3 mgd. flow in Waihee Stream is insufficient to supply the water Plaintiffs need to grow their presently cultivated taro acreage.

65. The Court finds insufficient evidence to justify Plaintiffs' demand of a 4 mgd. flow in Waihee Stream to alleviate their taro rot problems. At best, Plaintiffs' expert, Dr. Plucknett, could make only an estimate of Plaintiffs' total water needs at 4 mgd. On the other hand, the BOARD's expert, Mr. Watson, concluded that 40,000 gallons per acre per day (g.p.a.p.d.) was sufficient for taro cultivation. Mr. Watson's figure included water flowing through the taro patches and was in the range of other studies cited by him in his report. (Exhibit 37) Also, the Court takes note of the restriction in the deed in the chain of title of the property farmed by Plaintiffs NAKATA of 30,000 g.p.a.p.d. for taro cultivated (Exhibit N) and the amount awarded by the trial court and approved by the Hawaii Supreme Court in *McBryde v. Robinson* of 50,050 g.p.a.p.d.

66. The Court finds insufficient evidence to establish what the water requirements for taro were in Waihee at the time of the Mahele.

V. WATER MANAGEMENT OF BOARD ON WINDWARD OAHU

67. The BOARD supplies the water requirements of the approximately 120,000 residents of the Windward side of Oahu. The BOARD's Windward side supply system is self-contained, and no water is transported into or out of this system from or to other parts of Oahu.

68. In 1955, the BOARD's predecessor-in-interest (the City and County of Honolulu on behalf of the Suburban Water System) purchased land and water rights in Waihee and Kahaluu owned by Koolau Company, Ltd. by deed (Exhibit Z) in settlement of condemnation proceeding (See paragraphs 33 and 34 above), for the sum of $900,000.00, $408,000 for the Kahaluu interests and the remainder for the Waihee interests. (Exhibits 55, pp. 23-4)

69. The BOARD's predecessor-in-interest developed the water rights acquired in Waihee by constructon of the Waihee Tunnel in 1955. In 1974 and 1976 respectively, the BOARD installed pumping wells and inclined wells in Waihee to further develop the water resources in Waihee for public consumption. The total expenditures for said tunnel and wells was approximately $1,600,000.00.

70. The BOARD's extraction of water by the Waihee Tunnel and inclined wells is achieved by drilling into the Koolau mountains at the back of Waihee Valley and tapping into water stored in porous lava and dike structures within the mountains. The inclined wells and the tunnel are located at elevations of 690 and 218 feet respectively. (Exhibit EEE)

71. The Waihee pumping wells extract water from an underground source near the base of the Koolau's at an elevation of 180 feet, just below the level of the Waihee Tunnel. (Exhibit EEE)

72. Extraction of water by the BOARD from the Waihee Tunnel, inclined and pumping wells effects the Waihee Stream flow since the stream flow results from overflow of water from the mountains and seepage of water from underground sources. (Exhibit 45) Development of the sources reduced Waihee Stream flow from an average of about 6 mgd. to less than 2.3 mgd. in 1975-1977. (See paragraphs 54, 47 and 58 above)

73. The Waihee sources supply approximately one-third of the water consumed by Waindward side consumers.

74. Since issuance of the preliminary injunction in this case which took effect in September, 1977, the BOARD has had the following experience with its Windward supply system: (a) Peak demand in 1978 was 18.3 mgd. monthly average in September; (b) At the peak demand level of 18.3 mgd. the BOARD pumped Punaluu Wells II and III at a monthly average of 6 mgd., the BOARD's recommended sustainable yield for these wells; (c) Since September, 1977, in order to comply with the Court's preliminary injunction requiring the BOARD to allow 2.3 mgd. to flow in Waihee Stream, the BOARD has had to shut down its Waihee pumping wells completely and allow the incline wells to flow at a fairly constant rate of approximately .77 mgd.

75. If the BOARD pumps Punaluu Wells II and III at a rate greater than 6 mgd., the BOARD experiences an increase in the chloride levels at Punaluu Well II. The chloride measurement is related to the manner in which the surface between the fresh and salt water beneath the wells moves up and down as pumpage changes. An increase in the chloride level is considered serious and potentially harmful to the pumping source.

76. Even with a decrease in chloride levels at Punaluu Wells II and III last year, due to decreased pumping resulting from conservation efforts by Windward consumers, chloride levels are still above desirable levels.

77. Based upon the BOARD's experience since September, 1977, the Court finds that the BOARD will encounter problems with the chloride levels at Punaluu Well II if Windward demand rises above an 18.3 mgd. monthly average if no new sources are added to the BOARD's Windward supply system.

78. In the absence of any injunction restricting operation of its Waihee facilities, the BOARD could extract water from Waihee in an amount up to 12 mgd. during the peak demand summer months. With the present injuntion requiring the BOARD to allow 2.3 mgd. to flow in Waihee Stream, the BOARD has been able to extract only a maximum of 5.7 mgd. The significant decrease is due to the BOARD's inability to build up water stored in the mountain and the complex geohydrological relationship between water stored in the Koolau mountains, underground water and water flowing in Waihe'e Stream.

79. The only new source that will be added to the BOARD's Windward supply system in 1979 is Kahana Wells I which is

expected to produce 1 mgd. No large new source development is expected in the next several years.

80. The peak demand of 18.3 mgd. in September, 1978 experienced by the BOARD was the lowest peak demand for the Windward side since 1970. Peak demands for the years 1971 through 1976 were between 19.5 and 24.5 mgd. The low peak demand in 1978 was caused by a call for conservation of water by the BOARD to all Oahu water consumers.

81. An injunction requiring the BOARD to leave 4 mgd. flowing in the Waihe'e Stream would affect the BOARD's ability to use the storage capacity of water available at the Waihe'e Tunnel during the summer to the extent desired by the BOARD.

82. The BOARD had estimated that consumer demand for water for the Windward side would increase at the rate of 1 mgd. each year due to the growing population on the Windward side. Recently the BOARD has revised its estimate downwards so that only an additional 1/2 mgd. will be required each year to meet the increase in demand.

83. If the BOARD could not use any of its facilities at Waihe'e to supply its consumers, it would require at least five years to develop an adequate number of new sources to make up for the amount of water presently developed at Waihe'e by the BOARD.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.

2. The case of *McBryde v. Robinson,* 54 Haw. 174, *reh. den.* 55 Haw. 260 (1973), applies to this action, and in spite of the effect of the application of *McBryde* to this action as discussed below, *McBryde* is not unconstitutional as applied to the BOARD.

3. In the *McBryde* case, the Hawaii Supreme Court held that appurtenant and riparian rights cannot be conveyed or severed from the lands with which they are associated. Therefore, the deed by which Bishop Trust conveyed certain lands and all water rights that it owned in the ahupuaas of Kahaluu and Waihe'e to Koolau Company, Ltd. (Exhibit Y) was a nuliity to the extent that it conveyed water rights separately from the lands to which these rights were associated.

4. Based upon the conclusion stated in paragraph 3, the BOARD did not acquire by deed in lieu of condemnation from Koolau Company, Ltd. (Exhibit Z) the appurtenant or riparian

rights associated with the properties in Waihe'e in which Plaintiffs HALL, NAKATA, REPPUN and WONG have interests or the property in Kahaluu designated at TMK 4-7-26-5.

5. Plaintiff WONG's diversion of water from Waihe'e to Kahaluu for purposes of irrigating TMK 4-7-26-2 is not improper under the *McBryde* decision.

6. The Court finds insufficient evidence to be able to determine the measurement of Plaintiffs' appurtenant water rights. To make such a determination would require proof of taro's water requirements at the time of the Mahele in Waihe'e Valley. Plaintiffs have failed to produce sufficient evidence on this point for the Court to make such a determination.

7. Plaintiffs HALL, NAKATA and WONG's properties in Waihe'e and Kahaluu are riparian to Waihe'e's Stream and Plaintiffs are, therefore, entitled to riparian rights in Waihe'e Stream which permit Plaintiffs to use a reasonable amount of water for agricultural purposes on the lands owned or leased by them. Exclusions 12, 13 and 14 are not riparian parcels.

8. The Court finds that a flow of 2.3 mgd. in Waihe'e Stream is not adequate to supply Plaintiffs' needs for water for growing taro under present conditions and under the present water management system employed by Plaintiffs. There is, however, insufficient evidence to establish Plaintiffs' demand of 4 mgd. or the precise "flow thru" or absorption rate contended by Plaintiffs necessary to prevent taro rot or "pythium".

9. Based upon the conflicting evidence, the Court concludes that Plaintiffs are entitled to riparian rights to water in Waihe'e Stream of 2.7 mgd. for the cultivation of taro.

10. Unless an injunction is granted Plaintiffs to allow for said award of 2.7 mgd., said Plaintiffs will suffer irreparable injury to their livelihood. There is not adequate legal remedy to redress such inquiry.

11. After balancing the equities in this matter, the Plaintiffs are entitled to a minimum flow of 2.7 mgd. of water at the lower United States Geological Survey gauge above the first auwai intake. A minimum flow of 2.7 mgd. will allow the BOARD to adequatley supply the demands of its Windward consumers without causing any damage to the BOARD's water sources though it may have to call for conservation efforts by Windward consumers.

DATED: Honolulu, Hawaii, October 11, 1979

/s/ Arthur S. K. Fong

Judge of the above-entitled Court

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CHARLES F. REPPUN, et al. *Plaintiffs,* *vs.* BOARD OF WATER SUPPLY, City and County of Honolulu, *Defendant.*	CIVIL NO. 50121 ORDER GRANTING PERMANENT INJUNCTION

ORDER GRANTING PERMANENT INJUNCTION

This matter having come on for trial on February 12, 13 and 14, 1979, and Plaintiffs CHARLES F. REPPUN and PAUL REPPUN being represented by their attorneys Ronald Albu and Allene Richardson, Plaintiffs ROBERT S. NAKATA and SEIYU NAKATA and Plaintiffs-Intervenors CLIFFORD WONG and RACHEL HALL being represented by their attorney E. Cooper Brown, and Defendant BOARD OF WATER SUPPLY being represented by its attorney Deputy Corporation Counsel Samual P. King., Jr., and the Court having fully considered the pleadings, records, and files in this case, the testimony of the witnesses and other evidence submitted at the preliminary injunction hearing on August 10 and 14, 1978 and at trial, the facts observed on the Court's visit to Waihe'e and to Plaintiffs' and Plaintiffs-Intervenors' taro farms on the afternoon of February 13, 1979, and the arguments of counsel, the Court hereby grants a Permanent Injunction to Plaintiffs based upon this Court's Findings of Fact and Declarations of Conclusions of Law.

Defendant BOARD OF WATER SUPPLY, its officers, agents, servants, employees, attorneys and those persons in active consort or participation with them who received actual notice are hereby enjoined and restrained from causing any waters to be diverted from the source of the Waihe'e Stream which results in an amount of water flowing in the Waihe'e Stream at the United States Geological Survey Lower Stream Gauge 16284200 from falling below 2.7 million gallons per day. The BOARD OF WATER SUPPLY shall operate its diversion facilities in Waihe'e, Oahu, in such a manner that said 2.7 million gallons per day is available at the United States Geological Survey Lower Gauge at all times.

DATED: Honolulu, Hawaii, October 11, 1979.

s/ Arthur S. K. Fong
Judge of the above-entitled Court

SUPREME COURT OF HAWAII—1

Syllabus

CHARLES F. REPPUN, PAUL RUPPEN, ROBERT S. NAKATA, and SEIYU NAKATA, Plaintiffs-Appellees, Cross-Appellants, and CLIFFORD WONG and RACHEL HALL, Plaintiffs-Intervenors-Appellees, Cross-Appellants, *v.* BOARD OF WATER SUPPLY, City and County of Honolulu, Defendant-Appellant Cross-Appellee

NO. 7738

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE ARTHUR S. K. FONG, JUDGE

(CIVIL NO. 50121)

DECEMBER 20, 1982

RICHARDSON, C.J., LUM, NAKAMURA, JJ.,
AND RETIRED JUSTICES OGATA AND MENOR,
ASSIGNED TEMPORARILY

WATERS AND WATERCOURSES — *natural watercourses — riparian rights in general — constitutional and statutory provisions.*

Riparian rights in Hawaii are a product of the people's statutory rights to "flowing" and "running" water currently embodied in HRS § 7-1 (1976).

SAME — *same — same — same.*

The nature of water rights provided in HRS § 7-1 are limited by the purposes for their establishment.

SAME — *same — same — same.*

SAME — *same — same — nature and extent of rights in general.*

The riparian water rights created by HRS § 7-1 were not intended to be, and cannot be, severed from the land in any fashion. Their sole purpose is to provide water to make tenants' lands productive — no other incident of ownership attached.

SAME — *same — appurtenant rights — extent of right to use water.*

Appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple.

SAME — *same — same — same.*

Appurtenant water rights may not be severed or transferred but there is nothing to prevent the transferor of lands to which such rights attach from providing that the benefit of the right shall not pass to the transferee.

SAME — *same — riparian rights — constitutional and statutory provisions.*

While the statute creating riparian rights may indeed have been intended to engraft the "natural flow" version of riparianism onto the waters of our land, the continued satisfaction of the framers' intent requires that the doctrine be permitted to evolve in accordance with changing needs and circumstances.

SAME — *same — same — proceedings to determine, establish and protect rights.*

In order to maintain an action against a diversion which diminishes the quantity or flow of a natural watercourse, a riparian owner must demonstrate actual harm to his own reasonable use of those waters.

SAME — *same — appurtenant rights — burden of proof.*

When the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to give rise to a presumption that the amount of water diverted from such cultivation sufficiently approximates the quantity of appurtenant water rights to which that land is entitled.

SAME — *subterranean and percolating waters — actions — injunctions.*

Where surface water and ground water can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions which injure those rights, whether the diversions involve surface water or ground water.

SAME — *public water supply — domestic and municipal purposes — public use doctrine as bar to injunction.*

The public use doctrine is premised upon the general principle that the public interest is a factor to be considered in determining whether injuctive relief is appropriate in any situation.

SAME — *same — same — same.*

Where water has been improperly diverted by a public entity for actual public use, a complainant may not obtain injunctive relief against the diversion of water to which a public use has attached at the time suit is filed, unless the court, applying and interpreting Hawaii's Constitution and relevant statutes, finds that another public interest of substantially the same magnitude as that of the public's interest in adequate water will be advanced by injunctive relief.

SAME — *same — same — same.*

Normally a public use attaches at the time the water is actually used by the public and to the extent of such use, where, however, there is gradually increasing diversions, the critical point at which the doctrine becomes operational is when the diversion causes actual harm to the plaintiffs.

OPINION OF THE COURT BY RICHARDSON, C.J.

Both plaintiffs and defendants in this appeal contest the judgment of the trial court enjoining the Board of Water Supply of the City and County of Honolulu from reducing the flow of the Waihee stream below 2.7 million gallons per day. They essentially aver that the trial court misapplied the law governing water rights in our State as delineated in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, *Aff'd upon rehearing*, 55 Haw. 260, 517 P.2d 26 (1973) (*cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974) (hereinafter *McBryde*). The Board, however, also asserts *McBryde* is an aberration that must be overruled. We have re-examined our deci-

sion and are still convinced it represents a correct statement of the law governing water rights in Hawaii. But we find the trial court misapplied the precepts enunciated there. We therefore reverse the judgment of the trial court and remand the case.

I. INTRODUCTION

The geological structure of the Koolau mountains of Oahu enables parts thereof to act as natural reservoirs of fresh water; these natural storage compartments are called dike complexes or systems. The seepage and overflow from one such dike complex or system serve as the primary source of the Waihee stream. Competing claims to the waters of the stream and competing ownership claims to the waters at its source are advanced in this appeal.

The Board of Water Supply of the City and County of Honolulu (hereinafter BWS) maintains a tunnel and inclined shaft to facilitate the withdrawal of water from the Waihee dike system; it also pumps water therefrom. This substantial withdrawal of water by the BWS naturally diminishes the flow of the Waihee stream. Six taro farmers who claim appurtenant and riparian rights to the waters of the stream initiated this case, alleging that they are entitled at least to a flow of water sufficient to maintain their crops. Conversely, the BWS claims its predecessor in interest purchased the bulk of the rights to the waters in question. It contends the withdrawals of water cannot be deemed a legal wrong subject to injuction since it draws water from the underground source rather than the stream. It further asserts that the "public use doctrine" precludes the issuance of an injunction here.

II. STATEMENT OF THE CASE

The natural flow of the Waihee stream is approximately 6 to 8 million gallons per day (mgd). In 1955 the BWS[1] drilled a tunnel into the dike system feeding the stream. Water was subsequently

[1] The Honolulu Board of Water Supply is a duly authorized department of the City and County of Honolulu, a municipal corporation of the State of Hawaii. It is empowered to construct, operate and maintain the water systems of the city and county and acquire property and water rights for these systems.

withdrawn via the tunnel, thereby reducing the stream flow to approximately 4 mgd. In 1974 and 1976 the BWS increased the amount of withdrawable water by constructing inclined wells and pumping water from the dike system. When the wells were operative the flow of the Waihee stream was reduced to a summer average of 2.3 mgd in 1975 and 2.03 mgd in 1976.

The plaintiffs utilize the waters of the Waihee stream to irrigate their crops. Their method of irrigation involves a diversion of the waters from the stream to flood and flow through their taro[2] patches or lois, which approximates the traditional means of taro cultivation.[3] Until 1975 the stream's flow was sufficient to satisfy their needs. However, in the summer of 1975, one of the farmers sustained crop losses from a fungal growth known as pythium[4] that causes rot in the root or corm of the taro plants. In subsequent years all the plaintiffs save one suffered losses attributable to pythium. Plaintiffs believed, and the trial court subsequently agreed, that the proliferation of pythium was related to the diminution of the flow of the Waihee stream, as the spread of the fungus can be retarded or halted by a flow of cool fresh water through the taro lois and such a flow was rendered impossible by the actions of the BWS. This suit was therefore initiated in 1976 to enjoin the BWS from diverting any of the stream's waters.[5]

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[2] "Taro (Colocasia escylenta) is a kind of aroid cultivated since ancient times for food spreading widely from the topics of the Old World. In Hawaii taro has been the staple from earliest times. . . and its culture developed greatly including more than 300 forms. All parts of the plant are eaten, its starch root principally as *poi*, and its leaves as *lu'au*. It is a perennial herb consisting of a cluster of long-stemmed, heart shaped leaves rising a foot or more from underground tubers or corms." Pukui & Elbert, Hawaiian Dictionary, 115 (1971).

[3] As to the traditional means of cultivating wet land taro see, Handy & Handy, *Native Planters in Old Hawaii*, 90-102 (1972).

[4] Pythium infestation causes "the transformation of the normally firm flesh of the corm into a soft, mushy, often evil-smelling mass, unfit for human consumption." Parris, Diseases of Taro in Hawaii and their Control, 9 (1941).

[5] Plaintiffs also claim to be entitled to injunctive relief because of alleged BWS violations of various environmental statutes and regulations. Each of these claims were either dismissed or remanded by the trial court. We see no basis for reversing the trial court on these matters.

A.

The plaintiffs' claims to the waters of the Waihee stream stem from their status as landowners or lessees of riparian lands and from the fact that much of their lands were devoted to the cultivation of taro at the time of the Great Mahele, when the lands were granted in fee to their occupants. They assert they are thus entitled to 1) riparian rights to the natural flow of the Waihee stream, and 2) appurtenant rights to water required in the cultivation of taro on all lands that were being utilized for such purpose at the time of the Mahele.

The BWS counters by claiming it purchased virtually all of the rights now being asserted by plaintiffs. This claim, which also has its genesis in the Great Mahele, may be summarized as follows:

(1) In 1848 the system under which lands were held in the Kingdom of Hawaii was converted from one where title to all land was held by the King in trust for the people to one where fee simple ownership was recognized. The bulk of the ahupuaa of Waihee was set aside by the Mahele as crown lands, *i.e.*, as part of the King's private property, but each of these grants was made "subject . . . to the rights of tenants."

(2) In 1855 most of the ahupuaa was conveyed to Benjamin Parker. Subsequently, Bishop Trust Company, as trustee for Kahaluu Land Trust, acquired title to Parker's interests in the ahupuaa. This covered most of the property currently owned or leased by the plaintiffs in Waihee.

(3) In 1950, Bishop Trust transferred by deed "all the right, title and interest of the Grantor to water having its source upon or flowing under or over the land [held by Bishop Trust] . . . and all easements or rights in the nature of easements to the continuous or interrupted flow of water, ditches and auwais on said land" to the Koolau Company. The deed also transferred to the Koolau Company certain watershed land. At the same time, Bishop Trust transferred its land in Waihee, subject to the above-mentioned grant of water rights, to the Kahaluu Company.

(4) Except for a few exclusions,[6] the properties occupied by

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[6] The BWS does not contest the continued attachment of water rights to these parcels owned by plaintiff Hall.

the plaintiff taro farmers were purchased from the Kahaluu Company or Bishop Trust subject to water rights reservations. The property occupied by plaintiff Nakata was purchased with a restriction which specifically identified the quantity of water he was entitled to withdraw,[7] and the properties currently occupied by the other farmers, except for those limited areas that were not subject to any restriction, were purchased subject to the above-mentioned grant of water rights in favor of the Koolau Company.

(5) In 1955, in the settlement of a condemnation action, BWS' predecessor in interest purchased the watershed property and water rights held by the Koolau Company for $900,000.

Thus, a critical issue in this case is whether most of the water rights theretofore attaching to the plaintiff taro farmers' land were effectively severed and transferred by deed to the BWS. The trial court, interpreting our opinion in *McBryde v. Robinson, supra,* as precluding the severance of such rights, held that the water rights of the plaintiffs could not be severed from the land to which they appertained and the deed by which the Koolau Company conveyed certain lands and all water rights that it owned in Waihee to the BWS was therefore a nullity with respect to any attempted conveyance of water rights. This conclusion is of course contested by the BWS.

B.

Having established that the water rights of the plaintiffs were not

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[7] In 1941, land including the parcel of land in Waihee now farmed by Plaintiffs Nakata was conveyed by Bishop Trust to Thomas Higa, the predecessor-in-interest of the present owner, T & S, Inc. The 1941 deed contained a restriction limiting the water rights associated with the parcel as follows:

> And also TOGETHER WITH the following water rights:
> the right to take from the streams and ditches from the Grantor sufficient water to irrigate taro and other crops actually growing at any time on such land, but not to exceed 30,000 gallons per acre per day for not more than 4.85 acre per day for not more than 4.85 acres that is to say, a total of 145,000 gallons per day of 24 hours; the right to take from streams and ditches of the Grantor water sufficient for domestic purposes on the granted premises and for the watering of any livestock that may be on the granted premises; the right to take from the streams and ditches of the Grantor not more than 5,000 gallons per day for irrigation of crops on any portion of the granted premises other than the 4.85 acres of wet land, it being understood and agreed that the foregoing granted water rights constitute ail the water rights to which the granted premises are or shall be entitled under or by reason of this deed; . . . .

severed and transferred to the BWS by the 1955 deed, it remained for the trial court to identify and quantify the respective entitlements to water. As to appurtenant rights, the plaintiffs identified to the court's satisfaction those areas of land which were utilized to cultivate taro at the time of the property's conversion into fee simple and to which appurtenant water rights therefore attached. Neither side contests these findings. However, the court found that insufficient evidence had been presented regarding the measure of such rights because such a determination would require proof of taro's water requirements in the Waihee Valley at the time of the Mahele. Plaintiffs contend in their appeal that the evidence which they presented in current taro farming methods and water requirements was sufficient to establish the quantity of water appertaining to their lands.

With respect to riparian rights, the trial court found all the plaintiffs' lands to be riparian except for three excluded areas.[8] As to the actual quantity of water to which the riparian lands were entitled, the court concluded that "based on conflicting evidence" the plaintiffs were entitled to 2.7 mgd for the cultivation of taro. Both sides now contest this determination, the plaintiffs asserting that their riparian rights entitle them to the undiminished flow of the stream or at least the 4 mgd that they assert is necessary to irrigate their taro crops and retard the spread of pythium, and the BWS asserting that such an allocation exceeds the quantity to which the plaintiffs are entitled.

C.

The remedy afforded the plaintiffs was a permanent injunction prohibiting the BWS from causing the diversion of waters from the source of the Waihee stream that would have the effect of reducing the flow of the stream to below 2.7 mgd. The court concluded the remedy was proper as a product of its "balancing the equities", since any further diminution of the stream's flow would cause irreparable injury to the plaintiffs' livelihood and a minimum flow of 2.7 mgd

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[8] Plaintiffs contest the exclusion of these areas from land possessing riparian rights, while the BWS contends that the trial court incorrectly attached riparian rights to the Wongs' holdings in the adjoining ahupuaa of Kahalu'u. We find no basis for error in the court's conclusions in either respect.

would allow the BWS to adequately supply the demands of its consumers without causing damage to the BWS's other water sources. Plaintiffs contest the adequacy of the relief provided and the BWS challenges the propriety of such relief. The principal grounds for the BWS's argument are the existing commitment of the water resources of Waihee to public use and the fact that its withdrawal of water is from a groundwater source rather than from the stream itself.

III. ISSUES

In our estimation the dispositive questions in this appeal are:

(A) Whether most of the plaintiff taro farmers' appurtenant and riparian rights were severed and conveyed to the BWS;

(B) Whether the trial court erred in finding that the plaintiff taro farmers were entitled to 2.7 mgd by virtue of their riparian rights, and that the quantity of water to which they were entitled by virtue of their appurtenant rights was not demonstrated by evidence;

(C) Whether the BWS's diversions diminishing the stream cannot be enjoined because they are from a groundwater source rather than from the stream itself;

(D) Whether the issuance of an injunction was improper because of the commitment of the resource to "public use."

IV. DISCUSSION

A. SEVERANCE OF RIPARIAN AND APPURTENANT RIGHTS

The plaintiff taro farmers' claims to the waters of the Waihee stream are premised on *McBryde v. Robinson, supra.* There, we held, inter alia, that 1) HRS § 7-1, originally enacted in 1850 as section 7 of our kuleana act, imposed the "natural flow" doctrine of riparianism upon the waters of our state; 2) that riparian water rights appertain only to land adjoining a natural watercourse for its use; and 3) that the right to the use of water by virtue of its application to the land at the time of the Mahele, *i.e.,* appurtenant water rights, may be used only in connection with those particular parcels of land to which that right appertains. Plaintiffs read *McBryde* as stating that neither

appurtenant nor riparian rights can be severed from the land. Thus they contend the deed by which the BWS claims to have purchased their rights was a nullity and all water rights in the ahupuaa of Waihee are still intact.

The BWS contends *McBryde* is not subject to being so interpreted and applied. It not only argues against any reading that would forbid the severance of water rights, but urges this court to overrule *McBryde* and reinstitute what it regards as prior Hawaii water law on surplus and appurtenant water rights.[9]

i. APPLICABILITY OF *McBRYDE v. ROBINSON.*

We decline the invitation to overrule *McBryde v. Robinson, supra.* We find that the rules of law posited in that opinion are applicable here.

McBryde has been criticized as an unjustifiable deviation from pre-existing water law.[10] But a re-examination of the development of the laws governing water in this jurisdiction convinces us of its soundness. Our local system of water rights is "based upon and is an outgrowth of ancient Hawaiian customs and methods of Hawaiians in dealing with the subject of water." *Territory v. Gay,* 31 Haw. 376, 395 (1930). In ancient times there was no resource more precious. Although there is a belief that at some point this resource was transformed into a freely transferable private commodity, we do not find this to be so. For in *McBryde* we re-examined what some believed to be the foundation of certain private rights and interests in water and found them to be fatally flawed. We therefore set about to correct these errors of the past, as it was both our duty and prerogative to do.

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[9] The BWS also argues that any application of *McBryde* to this case holding the transfer of water rights void would constitute a "taking" in violation of the Fifth Amendment of the United States Constitution. Under the circumstances of this case we do not agree that a fifth amendment issue is raised.

The Fifth Amendment of the Constitution provides that "No . . . private property [shall] be taken for public use, without just compensation." At issue in this case are the rights to use of private parties who claim an interest in property rights claimed to be held by an agency of government. The ostensible usurpation of private rights by the public is not at issue.

[10] See, *Robinson v. Ariyoshi,* 441 F. Supp. 559 D. Hawaii 1977).

Our understanding of the necessity for the holding in *McBryde* begins with the native system of water allocation. This system has been recently described as follows:

> Perhaps the essential feature of the ancient water system was that water was guaranteed to those natives who needed it, provided they helped in the construction of the irrigation system. Because agriculture was a matter of great importance to the Hawaiians, they were, in general, willing to contribute their efforts to the water system. The konohikis aimed to secure equal rights to all makaainana and to avoid disputes. Beneficial use of water by the makaainana were also essential to the continued delivery of water. The natives were subject to compulsory maintenance work on the auwais under the supervision of the konohiki. The konohiki, on the other hand, was reluctant to impose unreasonable burdens on the tenants because they were normally free to leave a particular plot if unhappy with the konohiki. Hence a "spirit of mutual dependence and helpfulness prevailed, alike among the high and low, with respect to the use of water." (Citation omitted).

Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori and Yukimoto, *Water Rights in Hawaii*, in Land and Water Resource Management in Hawaii 141 (1977). The foregoing characterization is uncontroverted.

The system based on this "spirit of mutual dependence" was a stable one. While the authority for the distribution of water ultimately rested in the King, the chiefs, or their agents (konohiki), "the aim of the konohiki and all others in authority was to secure equal rights to all and to avoid quarrels." Perry, *A Brief History of Hawaiian Water Rights* 7 (1912). This benevolent attitude was not a product of indifference to the application of water nor of over-abundance. On the contrary, the cooperative nature of the system appears to have stemmed from the critical import of water in the lives of the people.

For example, the Hawaiian word "kanawai" denoting law or laws related originally to regulations regarding water. *Id.* at 3. Interference with existing auwais was punishable by death, and the body of the offender was used to repair whatever damage done to deter further offenses. Nakuina, *Ancient Hawaiian Water Rights*, in Thrums Hawaiian Annual 79 (1894). Failure to keep one's auwai in repair was a ground for the cutting off of water privileges. *Id.* at 82. And the

completion of a new watercourse was the occasion for religious thanksgiving and celebration. *Id.*

As with the ownership of land, there were no fixed rights to water. Hutchins, *The Hawaiian System of Water Rights*, 21, 22 (1946). Rather, water privileges were earned through participation in the construction of the irrigation systems and retained only by the productive application of the waters to which one was thereby entitled Handy and Handy, *Native Planters in Old Hawaii* 31 (1972). Inasmuch as the prosperity of the landlord was dependent upon the productivity of all of his assigned lands, he necessarily attempted to insure that maximum benefit was achieved through the application of the vital resource. *Id.* at 279. In times of plenty, all shared in nature's munificence; in times of scarcity, allocation was resorted to in order to insure the survival of all.

The natute of the activity to which water was applied reinforced the cooperative aspects of its allocation. *Id.* See also, Earl, *Control Hierarchies in the Traditional Irrigation Economy of the Halelea District, Kauai, Hawaii*, 160 (1973). The principal crop requiring irrigation was taro, the staple of the native Hawaiian lifestyle. The irrigation of taro called for flowing water, most of which was not consumed by the land. Hence, a cooperative system whereby unused waters were returned to their source or allowed to flow into lower adjoining patches maximized the application of the resource. Handy & Handy, *Native Planters in Old Hawaii, supra.*

The limitations of technology also fostered cooperation, for the irrigational systems required in the culture of taro could only be constructed through the joint efforts of those who would benefit thereby. That the labor of the commoners would be rewarded by the just application of the resource to their land was insured by the fact that they were not "serfs" tied to the land by any particular obligation to the landlord, but were free to leave at any time and begin their efforts anew in virtually any uncultivated area. Van Dyke et al., *Water Rights in Hawaii, supra.*

Finally, it was entirely to the advantage of the konohiki or landlord that water be allocated according to industry and need. Prior to the imposition of western ways water had little value apart from its application. Thus, it was considered strictly a resource to be used when required, not a commodity. In an agrarian society where technological capacity for storage or long range transport was non-

existent, there was simply no value in hoarding water or in even fixing an amount to which any person would be entitled. This was, of course, to change.

In 1840 the first constitution of the Kingdom of Hawaii proclaimed that although all property belonged to the crown "it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head and had the management of landed property." Hawaii Const. of 1840 in *Fundamental Laws of Hawaii* 3 (1904). Thus, prior to the Mahele, all land remained in the public domain. However, other laws passed during the same period laid the foundation for the eventual imposition of private property rights in land by limiting the King's and landlords' heretofore unregulated authority to disseize one to whom land had been granted and insuring certain rights of the common people and lesser lords. In contrast, the law governing the regulation of water, passed in 1839, instead of affirming private authority, treated the resource as a benefit reserved to the community.

Specifically, the law "Respecting Water for Irrigation" provided that:

> In all places which are watered by irrigation, those farms which have not formerly received a division of water, shall when this new regulation respecting lands is circulated, be supplied in accordance with this law, the design of which is to correct in full all those abuses which men have introduced. *All those farms which were formerly denied a division of the water, shall receive their equal proportion. Those bounties which God has provided for the several places should be equally distributed, in order that there may be an equal distribution of happiness among all those who labor in those places.* The allowance of water shall be in proportion to the amount of taxes paid by the several lands. For *it is not the design of this law to withhold unjustly from one, in order to unjustly enrich another according to the old system which has been in vogue down to the present time. That the land agents and the lazy class of persons who live about us should be enriched to the impoverishment of the lower classes who with patience toil under their burdens and in the heat of the sun is not in accordance with the designs of the law.* . . . Such is considered to be the proper course by this law, regulating the property of the kingdom; not in accordance with the former customs of the country which was for the chiefs and land agents to monopolize to themselves every source of profit.

Not so with this law. (Emphasis added.)
Laws of 1842 in *Fundamental Laws of Hawaii* 29 (1904).

The law, passed a mere six years prior to the Mahele, is significant both in terms of its provisions and obvious underlying sentiment. The distibution of water is predicated not upon servience to the landlord of an ahupuaa but rather on taxes paid to the crown, thereby suggesting that the control of all waters lay with the central government rather than the landlords. Also noteworthy is the continued treatment of water as a natural bounty to be distributed according to industry and need rather than by virtue of control of the surrounding lands.

The law may have been a result of the destruction of natural restraints on the konohiki's historical authority over water.[11] As long as the konohiki was reliant upon the labor of the tenants both to work his own land and to insure the improvement of his ahupuaa, he was bound to a system of equitable distribution of water to insure mutual benefit. The advent of the western mercantile society diminished reliance upon the working of the land as a basis of wealth. Thus, with the introduction of the western concept of material wealth, water itself tended to be considered a commodity. In the absence of the natural limitation on abuses of authority, a need for the imposition of an equitable order becomes apparent if the King desired that this natural bounty be shared equally among his people.

The next major step in the evolution of private property rights was the formation in 1845 of the Board of Land Commissioners to quiet land titles. See *Law Creating the Board of Commissioners to Quiet Land Titles,* in Fundamental Laws of Hawaii 137 (1904). It was the Land Commission's responsibility to ascertain or reject claims of interests in land brought before it. Decisions of the Board were to be made in accordance *With the civil law and native customs of the Kingdom.* The Board itself was not empowered to grant fee simple title to land. Rather, its duty was to define each applicant's identifiable interests in land and issue an award describing those interests. Actual title to land could be gained only by a payment of commutation to the Kingdom and issuance of a royal patent. See, Chinen, *The Great*

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[11] For a general discussion of the deterioration of the native order at this time, *see* Kuykendall, *The Hawaiian Kingdom 1778-1854* (1938); Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848 (1975).

Mahele: Hawaii's Land Division of 1848 (1958)

To carry out its duties, the Land Commission adopted principles that were to be followed in quieting title to land. The principles were subsequently also adopted by the legislative council of the Kingdom and were made binding rules by which all claims to land would be tested. Laws of 1847 at 81, RLH 1925, Vol. II at 2124. In its statement of principles and Land Commission related the necessity of its establishment to the unenforceability of the laws passed at the time of the Constitution of 1840, noting that:

> Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The Land Commission therefore viewed its responsibilities as including the actualization of the laws of 1839 and 1840, among them, of course, the law governing water for irrigation which persisted in treating water as a commonly held resource.

Thus, when in the next paragraph the Board reserves from allocation to private persons "the sovereign prerogatives" of the King, including the power:

> To encourage and even to enforce the usufruct of lands for the common good[,]

it is clear that in accordance with pre-existing civil law and native usage, the Commission intended to reserve to the sovereign the right to regulate and allocate water resources in accord with the needs of the people of the Kingdom. We therefore concur with the conclusion reached in *McBryde* that:

> [T]he Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good.

54 Haw. at 186-87, 504 P.2d at 1339.

An expression of the will of the sovereign with respect to waters is

next found in section 7 of the Enactment of Further Principles. Laws of 1850, p. 202. This section provided in relevant part that:

> The people also shall have the right to drinking water, and running water and the right of way. The springs of water and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.

In *McBryde* meaning was given to this language for the first time when we ruled that the statute, at the time of its passage, imposed the "natural flow" doctrine of riparianism upon the waters of the Kingdom. We continue to find this interpretation to be appropriate and proper.

First, the doctrine is consistent with the needs of native commoners at the time of the law's passage. Taro, the predominant agricultural crop, grew best where a steady flow of running water, most of which could be subsequently utilized by lower riparian users, occurred; the cultivation of taro took place principally upon riparian lands; and grants to commoners were restricted to lands they had in fact cultivated. Second, the principles underlying the doctrine are consistent with those that appear to pervade the native system of water allocation and pre-existing civil law inasmuch as: "title" to the water was not equated with the right to use; each person's right to use was a "correlative" nature; and rights to use were predicated upon beneficial application of the water to the land. And third, the presence of the riparian doctrine in this jurisdiction had, prior to 1930, been repeatedly adverted to in our caselaw. *See, e.g., Peck v. Bailey*, 8 Haw. 658, 661 (1867) (dicta describing riparian landowners' rights to water); *Davis v. Afong*, 5 Haw. 216 (1884) (spring and underground streams treated according to riparian principles); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675 (1904) (surplus water defined as water not covered by prescription or riparian rights).

In *McBryde*, we did not lightly infer that a judicially determined system of water rights was subject to alteration. Quite to the contrary, our decision there was premised on the firm conviction that prior courts had largely ignored the mandates of the rulers of the Kingdom and the traditions of the native Hawaiians in their zeal to convert these islands into a manageable western society.

Horner v. Kumulilii, 10 Haw. 174 (1895), illustrates some of the difficulties experienced in translating a system of water rights predicated upon mutual benefit into one based on private rights. The case involved the claim of the Pioneer Mill to the waters of the Kauaula Stream, which runs through the valley of the same name on the island of Maui. The valley divided into numerous ilis, ahupuaas and kuleanas, each of which shared in the waters of the stream. Under the ancient system of distribution, the valley was separated into two divisions of eleven land units each. Water was distributed to each unit by way of auwais that ran from the stream. Each unit received water once every eleven days, with a unit from one division taking by day and another by night.

The plaintiff-plantation became the owner and occupant of much of the land of the valley; after having violated the ancient system for more than twenty years, it claimed a prescriptive right to all the water it needed and also sought the strict imposition of the ancient system of rotation on the remaining "natives".

Exercising equitable powers, the court reinstituted the ancient system of rotation. In dicta, however, it expressed misgivings about the imposition of a fixed system of personal water rights and the inefficiency of such a transmutation of the ancient system. It noted that the eleven-day system was a product of an agreement of the konohikis of the various ahupuaas and ilis and that under the ancient system:

> The konohiki endeavored to secure equality of division and to avoid troublesome quarrels between the tenants; and when the quantum of water in the stream diminished through drought he saw to it that the quantity used by each was divided equally. (W)hen one kuleana seemed to need more water than the others at any particular time the konohiki on request would allow a constant small stream of water to continue in the particular auwai, after the patches were filled and while the main body of land was receiving its assigned supply. . . . *If the plaintiffs are "konohikis" of the various ahupuaas and ilis owned by them and are successors of the rights of the konohikis and insist upon them they ought to bear the burdens and responsibilities of the konohikis. But supplies of water by permission do not create a right to them and the court cannot compel favors to be granted.* (Emphasis added.)

Id. at 178, 179.

The western doctrine of "property" has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others and the right to transfer the property with the consent of the "owner". In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-Mahele judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts regarding property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.

Thus, the distinction drawn between "rights" and "supplies by permission" or "favors" in *Horner*, while making perfect sense within the western understanding of "property", would make no sense at all under the ancient system of allocation. Under the ancient system both the self-interest and responsibility of the konohikis would have created a duty to share and to maximize benefits for the residents of the ahupuaa. In other words, under the ancient system the "right" of the konohiki to control water was inseparable from his "duty" to assist each of the deserving tenants. The private division of land and the subsequent division of water allowed for the separation of this "right" from the concomitant "duty".

The pattern of isolating a traditional "right" from its correlative duties and obligations continued to serve as a basis for the evolution of private interests in water. Thus, in 1896 the court condoned the sale and transfer of appurtenant water on the grounds that inter-ahupuaa transfers were made in ancient times,[12] ignoring the fact that such transfers were undoubtedly made to satisfy some particular communal purpose and not for the exclusive benefit of a particular transferor or transferee. Similarly, in 1904, surplus water was deemed the property of the konohiki of the ahupuaa of its origin since "no limitation . . . existed or was supposed to exist to his power to use the surplus water as he saw fit."[13] Again, the essential nature of the konohiki's customary powers over the waters of his ahupuaa was disregarded, and an individual was granted a personal "right" to

[12] *Wong Leong v. Irwin*, 10 Haw. 265 (1896).

[13] *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904).

profit, presumably by virtue of ancient authority, from the sale and application of water without regard for the consequences to those who historically would have been within his charge.[14]

We cannot continue to ignore what we firmly believe were fundamental mistakes regarding one of the most precious of our resources. *McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water "rights" in Hawaii.

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[14] *Cf.* Handy & Handy, Native Planters, *supra* at 63-64:

WATER RIGHTS

Inalienable title to water rights in relation to land use is a conception that had no place in old Hawaiian thinking. The idea of private ownership of land was likewise unknown until Kamehameha's autocracy, established as a result of the intrusion of foreign concepts, set up the figment of monarchy, a politico-social pattern alien to the Polynesian scene theretofore existing.

Water, whether for irrigation, for drinking, or other domestic purposes, was something that "belonged" to Kane-i-ka-wai-ola (Procreator-in-the-water-of-life), and came through the meteorological agency of Lono-makua the Rain-provider. The *mo'i (ali'i nui*, great chief), the ranking aristocrat who was paramount by reason of genealogical primacy, was a living scion of Lono and of Kane, and as such was instrumental in the magico-religious induction of rain and flowing water which gave life to taro and *'uala* and paramount chief, born on the soil and hence first-born of the *maka'ainana* of a *moku* (island or district), was a medium in whom was vested divine power and authority. But this investment, which was established ritualistically as well as by genealogical primacy, was instrumental in providing only a channeling of power and authority, not a vested right. The person of the *ali'i nui* was sacred *(kapu)* as though he were a god *(akua)*. His power and authority *(mana)* was complete. But this was not equivalent to our European concept of "divine right." The *Ali'i nui*, in old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, he was a trustee. The instances in which an *ali'i nui* was rejected and even killed because of his abuse of his role are sufficient proof that it was not personal authority but trusteeship that established right *(pono)*.

Water, then, like sunlight, as a source of life to land and man, was the possession of no man, even the *ali'i nui* or *mo'i*. The right to use it depended entirely upon the use of it. So long as a family lived upon and cultivated land, using a given water source, and continued to contribute its share of labor required to maintain that water source, just so long did it maintain its "right" to that water. If the family did not use it, it no longer had a right to claim it.

The freezing of land titles and related irrigation and fishing rights by legalistic procedures and grants in fee simple was wholly a foreign innovation. After this occurred, from the point of view of old Hawaiian principles of land, water, and fishing tenure, the only Hawaiians who maintained land, water, or fishing rights were those who stayed with and continued to use their areas of cultivation, water, and fishing grounds. Those who abandoned and neglected them, leased or sold them, no longer had any righrs, namely the continued use and exercise of the right to use.

ii. SEVERABILITY OF RIPARIAN RIGHTS.

Having acknowledged and ratified *McBryde's* vitality, we turn to the question of whether the riparian rights of the plaintiffs were effectively severed and transferred by the language of the various deeds of title prupoting to do so. We conclude they were not.

BWS argues, and we agree, that even the "natural flow" theory of riparianism does not, in most jurisdictions, prohibit the annulment or severance of riparian rights by contract. *See,* 1 Clark, *Waters and Water Rights,* 70 (1967). But riparian rights in Hawaii are of statutory rather than common law origin. The privileges and rights attaching to riparian land should therefore be determined consistently with the statute to which their genesis is traceable.

Riparian rights in Hawaii are a product of the people's statutory rights to "flowing" and "running" water currently embodied in HRS § 7-1 (1976). HRS § 7-1 was originally enacted in 1850 as section 7 of what has come to be known as the Kuleana Act. The first six sections of the Act enabled the common people of Hawaii to secure fee simple title to the lands they actually cultivated. The seventh section contained the rights that were to accompany a commoner's tenancy. The section was drafted at the behest of the King and was reported to reflect his concern that "[a] little bit of land even with allodial title, it they be cut off from all other privileges would be of very little value." Privy Council Minutes, July 13, 1850. Thus, it appears that the riparian water rights of HRS § 7-1 were established to enable tenants of ahupuaas to make productive use of their lands.

Riparian rights in Hawaii are thus analogous to the federally reserved water rights accruing to Indian reservations pursuant to *Winters v. United States,* 207 U.S. 564 (1908). In words reminiscent of Hawaii's King, the Supreme Court has described that decision as follows: "The Court in *Winters* concluded that the Government, when it created [an] Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona v. California,* 373 U.S. 546, 600 (1963). The Court in *Winters* thus implied from a treaty establishing the Fort Belknap Indian Reservation a reservation of enough unappropriated waters to fulfull the purposes of the treaty.

The issue of the transferability of Indian water rights vested pursuant to the *Winters* doctrine has also arisen. *See generally* Palma,

Considerations and Conclusions Concerning the Transferability of Indian Water Rights, 20 Nat. Res. J. 91 (1980). We find a particular federal court's treatment of this analogous situation instructive. In *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978), the question before the court was whether the water rights reserved to Indian reservations were effectively transferred to subsequent non-Indian purchasers of reservation lands. The court, looking to the underlying rationale for the implied reservation of water, concluded that they were not. *Id.* at 1328. It reasoned that since, under the *Winters* doctrine, water was impliedly reserved to ensure that the land set aside for a permanent homeland would have water necessary for the purposes of the reservation, the water right was implicitly limited to purposes of the reservation and were therefore extinguished when the lands passed from Indian hands. *Cf. Cappaert v. United States*, 426 U.S. 128, 141 (1976) (implied federal reservations of water limited to "only that amount necessary to fulfill the purposes of the reservation, no more."). *But see United States v. Adair*, 478 F. Supp. 336 (D. Ore. 1979) (permitting transfer of *Winters* doctrine rights because it would advance the purpose of permitting Indians to sell their lands on equal terms with non-Indians).

We find such reasoning highly persuasive and applicable to the situation before us. And we likewise conclude that the nature of the water rights provided in HRS § 7-1 are limited by the purposes for their establishment. We are equally convinced that the creation of an independent source of profit for the possessors of water rights was not included among such purposes. The language of the statute itself, referring specifically to other articulated rights, provides that privileges enumerated in that section were "for their [the people's] own use, but they shall not have the right to take such articles to sell for profit." HRS § 7-1. We conclude that the riparian water rights created by HRS § 7-1 were not intended to be, and cannot be, severed from the land in any fashion. Their sole purpose is to provide water to make tenants' lands productive — no other incident of ownership attached. The trial judge in this case thus correctly ruled that all attempts to sever or extinguish the riparian rights of the plaintiffs were ineffective.

Additional support for this conclusion is found in *Damon v. Tsutsui*, 31 Haw. 678 (1930), which involved an attempt by a landlord to sever by deed certain fishing rights that had been statutorily

reserved to tenants. The court held the attempted severance was without effect as to the original tenant's successor in interest. It reasoned that the severance was ineffective because the fishing rights simply were not the landlord's to convey because the tenant "receives his rights *through the statute,*" (emphasis added) *id.* at 689, rather than from his predecessor in interest.

Here, as in *Damon,* the riparian rights purportedly reserved in the plaintiff's respective deeds were statutory creations. They were therefore not subject to reservation by deed; they were not the grantor's to reserve.

iii. SEVERABILITY OF APPURTENANT RIGHTS.

Unlike riparian rights, appurtenant water rights are incidents of land ownership. In the first of our recorded cases governing water rights the nature and foundation of these rights were described thusly:

> [When a grantor] has conveyed portions [of an] ahupuaa to several persons . . . [e]ach grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the [artificial] water on their lands and all the water which the lands had enjoyed from time immemorial.

Peck v. Bailey, supra at 662. These rights were characterized by the court as "appurtenant to . . . lands", *id.*, and superior to riparian rights inasmuch as they constituted "an easement in favor of the [property with an appurtenant right] as the dominant estate." *Id.*

Thus, appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land. In *McBryde v. Robinson, supra,* we ruled that the appurtenant nature of these rights precluded the transfer of such waters. We said "[t]he use of the water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant", overruling "any contrary indications in our caselaw." 54 Haw. at 191, 504 P.2d at 1341. The trial court in this case read the foregoing limitation to preclude the severance of such rights so that the deeds pruporting to transfer or reserve plaintiffs' water rights were of no effect with respect to any appurtenant rights which attached to their lands.

We agree that the rule posited in *McBryde* prevents the effective

severance or transfer of appurtenant water rights. This position is consistent with the general rule that appurtenant easements attach to the land to be benefited and cannot exist or be utilized apart from the dominant estate. ALI, Restat. Prop. § 487, comment b. We find, however, that while no appurtenant rights were effectively transferred in this case, the deed that attempted to reserve such rights had the effect of extinguishing them. For while easements appurtenant may not be utilized for other than the dominant estate, "[t]here is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant [estate]." *Id.*

There appears to be no question here that the plaintiffs' grantors, in attempting to reserve the water rights to themselves in spite of the transfer of the lands, intended to extinguish those rights which would otherwise have attached to plaintiffs' lands. While the nature of the water rights involved necessarily precluded the former, nothing would preclude the giving of effect to the latter. Thus, while the trial court correctly ruled that the BWS could not have acquired the appurtenant water rights of the plaintiffs because of *McBryde*, it erred in holding that the plaintiffs' land retained such rights, inasmuch as they were effectively extinguished by the attempted reservation of such rights.

B. THE MEASURE OF RIPARIAN AND APPURTENANT RIGHTS

i. MEASURE OF RIPARIAN RIGHTS.

In *McBryde* we described riparian rights as "the right [of a riparian owner] to use water flowing [in a natural watercourse] without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution in the shape and size given it by nature. This right is incapable of measurement into number of gallons per day." 54 Haw. at 198, 504 P.2d at 1344. The description mirrors that found in our first water case, *Peck v. Bailey*, *supra*:

> A riparian proprietor has the right to enjoy the benefits of a flow of water, as an incident to his estate, can use the water for irrigation, watering his cattle, and other domestic purposes, provided he does not materially diminish the supply of water or

render useless its application by others.

8 Haw. at 662. It would thus appear that riparian owners are entitled to the use of natural flow of the stream under the so-called "natural flow" theory of riparianism.

The BWS points out, however, that the doctrine's requirement of an undiminished streamflow fails to maximize the social and economic utility of the resource and "natural flow" has thus been largely abandoned in the United States in favor of the so-called "reasonable use" doctrine of riparianism. See, 5 Powell, *The Law of Real Property*, ¶ 711 (1949). Under this doctrine a riparian owner is entitled only to a "reasonable use" of the waters of a natural watercourse and may not bring an action to prohibit the reasonable use of another absent a demonstration of injury to his own use. *Id.*

We agree that the effect of permitting riparian owners to enjoin diversions beneficial to others in the absence of a demonstration of actual harm may occasionally lead to wasteful or even absurd results. But as we said, we are convinced the exclusive purpose of the statutory imposition of riparian rights in this jurisdiction was to enable tenants of ahupuaas to make productive use of their lands and that our interpretation of these rights must proceed in conformity with this purpose. And while the statute creating riparian rights may indeed have been intended to engraft the "natural flow" version of riparianism onto the waters of our land as found in *McBryde*, the continued satisfaction of the framers' intent requires that the doctrine be permitted to evolve in accordance with changing needs and circumstances. We therefore hold that in order to maintain an action for a diversion which diminishes the quantity or flow of a natural watercourse, a riparian owner must demonstrate actual harm to his own reasonable use of those waters.

We are satisfied that plaintiffs' use of the waters of the Waihee Stream is reasonable. Their mode of irrigation approximates that which has historically been utilized for the cultivation of taro. While this method may not necessarily be the most efficient means of irrigation, we do not find it unreasonable as a matter of law, for there has been no demonstration of unnecessary waste or proof that any more efficient means of irrigation are available to them. We are also satisfied that the trial court correctly ruled that the BWS's diminution of the flow of Waihee stream damaged plaintiffs' taro production. Plaintiffs are therefore entitled, pursuant to their riparian

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rights, to apply to their riparian lands waters from the Waihee stream sufficient to cultivate their crops in the manner in which they were accustomed prior to the BWS diversions that led to a damaging of their crops.

Having established the existence of their riparian rights and the reasonableness of their use, we are reluctant to impose a further burden on plaintiffs to prove the precise quantity of water to which they are entitled. Rather, the continuing use of the waters of the stream by the wrongful diversion should be contingent upon a demonstration that such use will not harm the established rights of others.[15]

ii. MEASURE OF APPURTENANT RIGHTS.

With respect to plaintiffs' lands where the appurtenant water rights were not extinguished, we find the trial court erred in concluding that plaintiffs failed to demonstrate adequately the quantity of water to which they were entitled. For while the proper measure of those rights is indeed the quantum of water utilized at the time of the Mahele, requiring too great a degree of precision in proof would make it all but impossible to even establish such rights. We therefore hold that when, as in this case, the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to give rise to a presumption that the amount of water diverted for such cultivation sufficiently approximates the quantity of the appurtenant water rights to which that land is entitled. Plaintiffs' remaining lands with appurtenant rights are therefore entitled to that amount of water utilized to cultivate taro prior to the BWS diversions that led to the damaging of their crops.

C. ENJOINING OF GROUNDWATER DIVERSIONS WHICH INTERFERE WITH SURFACE WATER RIGHTS

The BWS contends that it has a right to continue to divert and transfer water from the Waihee dike system irrespective of the rights

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[15] The trial court gives no explicit indication of how its conclusion as to the quantity of plaintiffs' riparian rights was reached other than it being based on "conflicting evidence." We therefore feel it is necessary for this figure to be re-examined in light of the above-stated rule.

of plaintiffs in the flow of Waihee stream because its diversions are from the groundwater source rather than from the stream itself. Conversely, plaintiffs contend that given the limitations on transferability found in *McBryde*, the BWS has no right to transfer water away from the property where it arises.

In most jurisdictions the rights to ground and surface water have evolved separately. The common law in treating surface and groundwater as distinct failed to recognize that both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence. *See* Haase, *Interrelationship of Ground and Surface Water: An Enigma to Western Water Law*, 10 S.W. U. L. Rev. 2069 (1978). Hawaii is no exception; artesian waters have been held subject to the doctrine of correlative rights, *City Mill Co. v. Honolulu Sewer and Water Comm.*, 30 Haw. 912 (1929); stream waters have been held subject to riparian and appurtenant rights, *McBryde v. Robinson*, *supra*, and no attemtp has been made to reconcile the possible conflicts between the two systems.

The trend in many states has been to recognize the interrelationship between surface and groundwater sources and to combine the control and management of both under a unified statutory scheme. See, 5 Clark (ed), *Waters and Water Rights*, *supra*, § 441 at 415, and statutes cited therein. This acknowledgment of the unity of the hydrological cycle has been characterized as the "modern scientific approach". Trelease, *Alaska's New Water Use Act*, 2 Land and Water L. Rev. 1, 15 (1967). We agree that the law must recognize that "all waters are part of a natural watercourse, whether visible or not, constituting a part of the whole body of moving water". *City of Colorado Springs v. Bender*, 148 Colo. 458, 461, 366 P.2d 552 (1961). We therefore hold that where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights, whether the diversion involves surface water or groundwater. *See* Restat. Torts 2d 858. BWS's groundwater diversions are therefore properly subject to limitation insofar as such diversions directly interfere with plaintiffs' riparian rights.[16]

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[16] The BWS contends that the impact of such a rule would be to make groundwater rights unpredictable. It further argues such a rule would be contrary to the public interest in that underground sources are more productive than surface water

Having determined that BWS groundwater diversions were properly treated by the trial court as contingent upon noninterference with the established surface water rights of the plaintiffs, we do not find it necessary to address the question of the nature and extent of their rights to groundwater diversions at this time.

D. PROPERTY OF INJUNCTIVE RELIEF

The BWS interposes the doctrine of intervention of a public use as a bar to the award of injunctive relief in this case. In essence, BWS argues that an injunction is an inappropriate remedy for the wrongful diversion of Waihee streamwater because a substantial portion of the community has come to depend on such diversion for its water needs.[17]

We recognize the public use doctrine is premised upon the general principle that the public interest is a factor to be considered in determining whether injunctive relief is appropriate in any situation. The operation of this principle was described by the United States Supreme Court in *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334,

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sources and that limiting groundwater withdrawals with surface water rights may ultimately interfere with all groundwater withdrawals.

We note first that while rights to artesian waters in Hawaii have been held to be of a correlative nature, the precise extent of these rights have never been fully defined, since in the only case which addressed groundwater rights there was no necessity to do so. *City Mill Co. v. Honolulu Sewer and Water Comm.*, *supra* at 933. Rather it was said that "[t]hose principles [delineating the scope of groundwater rights] will have to be considered and declared whenever such a question arises." *Id.* Thus groundwater rights have never been defined with exactness and the precise scope of those rights have always remained subject to development. They have thus always been in a sense "unpredictable."

As to the public interest of the rule adopted herein, we have only to consider the implications of failing to adopt such a rule. For if groundwater withdrawals were to be treated as wholly independent of surface water rights, streams which were dependent upon groundwater sources could be diminished or destroyed with impunity. We are not convinced at this point that such a rule would be in the public interest.

[17] As found by the trial court the BWS supplies the water requirements of approximately 120,000 residents on the windward side of Oahu exclusively with water from its windward pumping sources. The Waihee dike-structure supplies approximately one-third of this water and is the only windward sources which can be manipulated to accommodate times of shortage or peak demand. The Waihee sources also play an integral part in the BWS's plans to satisfy future water needs and there are no immediately accessible replacement sources.

337-38 (1933), as follows:

> [A]n injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private. . . . Where an important public interest would be prejudiced, the reason for denying the injunction may be compelling.[18]

And in considering appropriate remedies in water rights actions, a number of state courts have acknowledged the influence exerted by the public interest. *See, e.g.: Adams v. Greenwich Water Company*, 138 Conn. 205, 83 A.2d 177, 183-84 (1951); *Bennett v. City of Salem*, 192 Or. 531, 235 P.2d 772, 778-79 (1951); and *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738, 747 (Neb. 1966).

However, in some jurisdictions, most notably California, this general principle appears to have evolved, especially in the realm of water rights, into a less flexible public use doctrine. Its contours are unclear, and the degree to which it no longer expresses merely an aspect of the flexibility of equity is uncertain. But applied in its least flexible form, an application urged here by BWS in the context of water law, the doctrine holds that once a public use of water has intervened, a claimant who has demonstrated wrongful diversion of that water may not seek to enjoin such use, but is instead relegated to a damages remedy.

The doctrine is said to "[have] . . . its foundation chiefly in the inconvenience to the public if service is interrupted by the issuance of an injunction to restrain the use." *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 920, 207 P.2d 17, 25 (1949). Such inconvenience is avoided under the theory that "after property is taken for a public use by a public service corporation and has been devoted to that purpose, the public thereby and thereupon acquires rights in such public use which cannot be divested or destroyed at the behest of a private individual upon the ground or for the reason that his

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[18] "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937).

property will suffer damage or deteriorate in value . . . ." *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 132, 266 P. 944, 947 (1928).

Following this theory, the doctrine attaches prime importance to *when* a public use intervenes to preclude injunctive relief for prior improper diversions. The doctrine is relatively clear in this regard: "The term 'use' as involved in the doctrine of intervention of a public use, refers to the actual *use at and before the time suit was filed*, as distinguished from a future intended use, of the property for a purpose beneficial to the public. It connotes not an intended future devotion to the public service but an actual previous devotion to the public service." (Emphasis added.) *Rank v. (Krug) United States*, 142 F. Supp. 1, 134 (S.D. Cal. 1956).[19]

Less clear in the operation of the doctrine is the question of whether a public use will intervene to preclude or create a strong presumption against injunctive relief *prior* to a claimant's actual or imputed knowledge of the wrongful diversion. Some cases appear to emphasize a claimant's prior knowledge and inaction as a prerequisite to the application of the doctrine:

> [W]here a person has suffered property belonging to him and under his control to be taken and devoted to a public use by one engaged in administering such use, and the matter has gone on so far that the beneficiaries thereof rely on its continuance and adjust their affairs accordingly, *such owner having knowledge thereof and making no objection or protest*, this conduct will be regarded by the courts as a dedication by such owner of the property to the particular public use, and he cannot thereafter interrupt nor prevent the same, his only remedy being to seek compensation for the property he has thus allowed to be taken . . . .

(Emphasis added.) *Miller & Lux v. Enterprise Canal & Land Co.*, 169

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[19] *Rank* contains a thorough discussion of the public use doctrine and review of the California cases in the context of a major California water rights action. *Rank v. (Krug) United States, supra*, 142 F. Supp. at 130-49. Among other points made therein, the court disputes the rigid application of the doctrine urged here by BWS:

> The cases do not present the doctrine of intervention of a public use of an absolute bar to injunctive relief, but rather indicate that prohibitory injunctive relief should be granted only if it appears that no other relief is adequate. Thus it is at most indicated that a Court should be reluctant to grant a prohibitory injunction where a public use has in fact intervened prior to suit.

Id. at 136-37.

Cal. 415, 429 147 P. 567, 573 (1915). See also *Conaway v. Yolo Water & Power Co., supra,* 266 P. at 948, and *Collier v. Merced Irrigation District,* 213 Cal. 554, 2 P.2d 790, 793 (1931). In contrast, other cases emphasize that the doctrine may apply in the absence of claimant's knowledge of the wrongful diversion:

> The doctrine that intervention of a public use will foreclose the right to an injunction rests not only on estoppel. The doctrine may be applicable even though the aggrieved party be in ignorance of the violation of his rights. In other words, implied dedication to public use is not essential to the operation of the doctrine. Public policy in favor of a continuance of the public use may also be invoked to prevent a prohibitive injunction. *Peabody v. Valejo* . . . [40 P.2d 586, 497 (Cal.1935)]. . . .

Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 688, 76 P.2d 681, 687 (1938). *Rank v. (Krug) United States, supra,* 142 F. Supp. at 136, synthesizes the two contrasting positions in the following manner:

> Aside from the public policy theory for denying injunctive relief where a public use has in fact attached, if the facts show an implied dedication to the public use by laches or an estoppel against the prior owner, it can be held on that basis that the prior owner's right to prohibitory relief is cut off. In such case the Court is really applying the equitable doctrine of implied dedication by estoppel, though it may be doing so in a situation where a public use has in fact attached.
>
> Where the fact do not show an implied dedication by estoppel, the Court is required to determine whether the public policy against inconvenient interruption of a water service on which the public has come to depend before suit, it offended. The doctrine of intervention of a public use is applicable *only* if one of the two theories, public policy or implied dedication, is satisfied by the facts of the particular case.

In considering the applicability of the public use doctrine or some form therof to water rights actions in this jurisdiction, we begin with the clear recognition that the public interest is a relevant factor in deciding what remedy is proper for any wrong. *E.g., Life of the Land v. Ariyoshi,* 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978) (public interest one of three elements re propriety of temporary injunction of construction projects). However, thus far we have not

carried this principle a step further and adopted a doctrine such as that of intervention of a public use in water rights or other actions.

We are mindful of the competing goals that must be considered in deciding on the adoption of the public use doctrine in Hawaiian water law. On one hand, adoption of the doctrine, at least as strictly interpreted by some courts, would restrict the flexibility a court would otherwise have to fashion an equitable remedy in accordance with the facts and circumstances of each case.[20] On the other hand, it is also desirable that the public use of water, once that use has clearly attached, should be continued in order to avoid the harsh consequences of interruption.

With these objectives in mind, we adopt the public use doctrine with modifications to accommodate what we perceive are the competing interests. Thus, we hold that where water has been improperly diverted by a public entity[21] for actual public use,[22] a complainant may not obtain injunctive relief against the diversion of water to which a public use has attached at the time suit is filed, unless the court, applying and interpreting Hawaii's Constitution and relevant statutes, finds that another public interest of substantially the same magnitude as that of the public's interest in adequate water will be advanced by injunctive relief. Except as provided in the

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[20] The desirability of flexibility may perhaps be best realized by emphasizing that the public interest almost never lies solely on one side of the balance of equities. Can it be said, for example, that there is no public interest in the continuation of small-scale taro farming? *See* Hawaii Const. art. XI, § 3. ("The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.") Or can it be said that there is no public interest in a free-flowing stream for its own sake? *See* Hawaii Const. art. XI, § 1. ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty . . . .")

[21] While we restrict application of the doctrine to public entities, we do not foreclose the possibility that the doctrine might in appropriate circumstances apply to diversion by private parties.

[22] While we understand public use to mean the actual consumption of water by the general public, we do not foreclose the possibility that there may be other types of public uses to which the doctrine applies. Such as interpretation could, for example, follow from the definition, when given, of the term "beneficial and reasonable uses" of water by the water resources agency mandated by Hawaii Const. art. XI, § 7. ("The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; *define beneficial and reasonable uses;* . . . ." *(Emphasis added.)*

next paragraph, a public use attaches at the time the water is actually used by the public and only to the extent of such actual use. With regard to public uses that attach after the complaint for improper diversion is filed, injunctive relief, as discussed above, normally remains a particularly appropriate remedy unless the court in exercising the inherent flexibility of equity, concludes that modified injunctive relief or another remedy is more appropriate. In the case of prior attachment, however, damages rather than injunctive relief would normally be the preferred remedy.[23]

The instant situation, as more fully described below, appears to call for a modification in the application of the doctrine. Here, there was a pattern of gradually increasing water diversion. Initially, the diversion caused plaintiffs no injury. At some point, however, the diversion began to harm plaintiffs, though they were still unaware that the harm was caused by the diversion. More time elapsed between that point and the filing of the complaint for improper diversion. On these facts, it is clear that the doctrine should not apply to create a heavy presumption against the award of injunctive relief after the complaint is filed. But neither do we think that the doctrine should apply to the period between the time when the diversion increased to a degree resulting in harm to complainants and the filing of the complaint. To so hold would in effect give public water entities carte blanche to divert water up to the filing of the complaint with knowledge that in almost all sitautions such diversion would not be enjoined. Concomitantly, it would pose a "Catch-22" situation for complainants; by the time they would be able to note the harm done by the diversion and file their complaint, they would be presented with a fait accompli. We therefore modify the doctrine to provide

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[23] With regard to the proper measure of damages, the United States Supreme Court has stated:

> Damages [for injury to riparian rights] are to be measured by the difference in market value of the respondents' land before and after the interference or partial taking. As the Supreme Court of California said in *Collier v. Merced Irrigation District* . . . [*supra*, 2 P.2d at 797], ". . . [t]he riparian right is a part and parcel of the land in a legal sense, yet it is a usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property. The only way to measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property."

Dugan v. Rank, 372 U.S. 609, 624-25 (1963). To the same effect is *Elwood v. City of New York*, 450 F. Supp. 846, 874 (S.D.N.Y. 1978).

that where there is a gradually increasing diversion, the point at which the doctrine becomes operational is when the diversion causes harm to complainants, and not when the complaint is filed.[24] Thus, in such cases the doctrine would preclude an injunction against the diversion of waters applied to public use before actual harm ensued.

In applying the public use doctrine to this case, we first review the relevant facts. Until 1955, Waihee Stream flowed in its natural state, and complainants and/or their predecessors farmed taro with irrigation water taken from (and substantially returned to) the stream. In 1955, BWS placed Waihee Tunnel into operation and over the next two decades gradually increased the mount of water diverted from the stream via the tunnel. In May 1974, BWS began to operate new wells ("Waihee I") which drew from a different source than the tunnel and which further diminished streamflow. In February 1977, BWS placed into operation a second new group of wells ("Waihee II") that drew substantially from still another source than those feeding the tunnel and Waihee I. With these three sources in operation, BWS had the capability of drying up Waihee Stream for at least portions of each year.

The gradual diminution of streamflow from 1955 on did not injure any of claimants' taro operations until 1975 when, as the trial judge found, claimant Wong experienced taro rot problems in his patches. The trial judge further found that claimant Hall experienced the same problem in 1976. The trial judge also found that "the existence of taro rot in Plaintiff's taro patches is related to decreased flow of water in Waihee Stream."

The farmers filed their complaint for declaratory and injunctive relief on December 7, 1976, after the tunnel and Waihee I became

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[24] This assumes that the complainant is not chargeable with laches, estoppel or some other lack of diligence in bringing suit which precludes, independent of the public use doctrine, consideration of his action for injunctive relief. In noting this point, we dispose of the question, *supra*, whether a complainant's knowledge of the injury from improper diversion is a prerequisite to operation of the public use doctrine. We think it is not. A complainants' knowledge, either actual or imputed, is a key element in the operation of other doctrines which may preclude injunctive relief such as estoppel or laches. *See, e.g., Adair v. Hustace*, 64 Haw. 314, 640 P.2d 294 (1982) (latches is undue delay in prosecuting claim after actual or imputed knowledge of claim, which delay prejudices defendant). But it is not itself a relevant factor in operation of the public use doctrine.

operative but before that of Waihee II.[25] After issuing a preliminary injunction requiring BWS to leave 2.3 mgd in the stream at all times, which amount it later found was insufficient for plaintiffs' taro cultivation needs, the trial court on October 11, 1976 issued a permanent injunction requiring a 2.7 mgd minimum streamflow. According to the trial court, the amount represented a balance of the equities, one which would "allow the Board to adequately supply the damends of its windward customers without causing any damage to the Board's water sources, though it may have to call for conservation efforts by windward consumers . . . [,]" while still allowing some taro cultivation in Waihee Valley.

Therefore, in applying the doctrine the trial judge should first determine the time when the increasing diversion of Waihee streamwater first harmed the first claimant's taro cultivation. He should next determine what use was actually being made by the public of diverted streamwater just prior to that date. This amount will represent the amount of diversion which, under the public use doctrine, is not enjoinable. Diversion of the remaining water in Waihee Valley which would otherwise flow in Waihee Stream may properly be enjoined.[26]

SUMMARY

Our holdings as summarized are reiterated below:

1. Riparian rights.

    a. Water rights attaching to riparian lands by virtue of

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[25] The facts in this case do not present a situation for application of the doctrines of laches or estoppel. While not essential to this conclusion, it is worth noting in this regard the January 31, 1972 recommendation of BWS's consultant on further development of Waihee water resources that "[p]ublicity be held to an absolute minimum . . . [because] land owners in the area are extraordinarily sensitive with respect to their water rights."

[26] We do not mean to restrict BWS in the facilities it uses to extract the water which it is not enjoined from extracting. BWS may use Waihee II if it is desired even though those wells were put into operation after the complaint was filed. Nor do we imply that a blanket injunction requiring BWS to leave a certain amount of water in the stream at all times during the year is necessarily the best remedy. There may have been regular periods during years prior to the time of injury to the first claimant during which public use was greater or less than the yearly average. The purpose of the public use doctrine is merely to ascertain and preserve the status quo with regard to the *public's use* of water once that use "attaches."

HRS § 7-1 cannot be severed or extinguished by a riparian landowner's grantor. The riparian rights of each plaintiff taro farmer were therefore unaffected by language in their deeds that purported to reserve such water rights.

b. Riparian landowners are entitled to make reasonable use of the quantity and flow of a natural watercourse and may prevent diversions that interfere with such use.

1) The agricultural activities of the plaintiffs taro farmers constitute a reasonable use of the waters of the Waihee Stream as their mode of irrigation approximates that which has been historically utilized for the cultivation of taro. Plaintiffs are therefore entitled to the use of the waters of the Waihee Stream for the cultivation of their riparian lands with the quantity and flow that existed prior to the reduction of the flow that contributed to the damaging of their crops.

2. Appurtenant rights.

a. Appurtenant water rights are incidents of the ownership of land which, by virtue of their appurtenant nature, may not be transferred or applied to lands other than those to which the rights appertain. They may, however, be extinguished by the grantor of such lands.

b. When the same parcels of land are being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to establish a presumption that the amount of water diverted for such cultivation adequately approximates the quantity of the appurtenant water rights to which that land is entitled.

c. Plaintiffs' lands possessing appurtenant water rights that were not extinguished by their grantors are therefore entitled to the quantity and flow of water which was utilized to irrigate crops prior to the diminution of the stream that damaged the crops.

3. Enjoining of groundwater diversions that interfere with established streamflow rights.

a. Where surface and groundwater can be demonstrated to be interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights whether the diversion is of surface water

or groundwater. BWS diversions that interfered with plaintiffs' established rights were therefore properly the subject of an injunction.

4. The propriety of injunctive relief against a "public use."

a. As a general rule, where water has been improperly diverted by a public entity for actual public use, a complainant may not obtain injunctive relief against the diversion of water to which a public use has attached at the time the suit is filed, unless the court finds that a public interest of substantially the same magnitude will be advanced by injunctive relief.

1) Where, however, there is a gradually increasing diversion, the critical point at which the doctrine becomes operational is when the diversion causes actual harm to the plaintiffs.

Reversed and remanded for further proceedings in accordance with this opinion.

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Ronald Albu (Legal Aid Society of Hawaii) for Plaintiffs-Appellees, Cross-Appellants Reppuns.

E. Cooper Brown for Plaintiffs-Appellees, Cross-Appellants Nakatas and Plaintiffs-Intervenors-Appellees, Cross-Appellants Wong and Hall.

NO. 7738
IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1982

CHARLES F. REPPUN, et al. *Plaintiffs-Appellees,* *vs.* BOARD OF WATER SUPPLY, *Defendant-Appellant.*	CIVIL NO. 50121 APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER FILED OCTOBER 15, 1979 FIRST CIRCUIT COURT, THE HONORABLE ARTHUR S.K. FONG, Judge

JUDGMENT ON APPEAL

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CHARLES F. REPPUN, et al. *Plaintiffs-Appellees,* *vs.* BOARD OF WATER SUPPLY, *Defendant-Appellant.*	CIVIL NO. 50121 APPEAL FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER FILED OCTOBER 15, 1979 FIRST CIRCUIT COURT, THE HONORABLE ARTHUR S.K. FONG, Judge

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed on December 20, 1982, the judgment of the lower court is reversed and this case is remanded for further proceedings in accordance with this opinion.

DATED: Honolulu, Hawaii, February 10, 1983.

BY THE COURT:

_____
CLERK

APPROVED:

_____
JUSTICE

1. The Fifth Amendment of the United States Constitution provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Section 1 of the Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article VIII, SECTION 1 AND 2 OF THE HAWAII STATE CONSTITUTION PROVIDE:

Section 1. The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws. [Ren and am Const Con 1978 and election Nov 7, 1978]

Section 2. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

4. ARTICLE VII OF THE REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU PROVIDES IN PART:

Section 7-101. Organization—There shall be a department of water, to be known as the "board of water supply", consisting of a board of water supply, manager and chief engineer of the board of water supply and the necessary staff.

Section 7-102. Definitions—The terms "department" and "board" as used in this article of the charter shall have the following meaning:

(a) "Department" shall mean the governmental unit known as the "board of water supply", unless the context indicates otherwise.

(b) "Board" shall mean the policy-making body, consisting of seven members, of the board of water supply.

Section 7-103. Powers, Duties and Functions of the Department—

1. All water and sanitary sewerage systems of the city, including water rights and water sources, together with all materials, supplies and equipment and all real and personal property used or useful in connection with such water and sanitary sewerage systems shall be under the control of the department.

2. The department shall have full and complete authority to manage, control and operate the water and sanitary sewerage systems and properties used or useful in connection with such water and sanitary sewerage systems.

3. The department shall:

(a) Make studies, surveys, investigations and estimates relating to the locations and sources of water supply within the city, the amounts available for current and prospective uses, the water resources which may be made available for such uses and the maximum productivity of such sources.

(b) Investigate, examine, inspect and ascertain the manner and extent of use or other disposition of any water by any person irrespective of ownership thereof and any machinery, pump or other plant or equipment and conduits, pipes or other means used for the elevation, transmission or distribution of water, upon either public or private property and, in the case of wells, ascertain, as far as practicable, the depth thereof, depth and thickness of the different strata penetrated, pressure,

quantity, quality or chemical composition of the water, and the general conditions surrounding the same, including encasement, capping and other equipment or means of control thereof.

(c) Devise ways and means for the economic distribution and conservation of water.

(d) Make contracts necessary or convenient to the execution and performance of its powers, duties and functions.

4. To carry out the powers, duties and functions of the department, any member or authorized representative of the department may enter upon any public or private property at any reasonable time without warrant, doing no unnecessary injury thereto.

Section 7-104. Board of the Department of Water—The Board shall consist of seven members. The chief engineer of the department of public works of the city and the director of transportation of the State shall be members ex officio of the board. Five other members shall be appointed as provided by section 12-103 of this charter. Each member at the time of his appointment shall be an elector of the city. The chairman of the board shall be elected annually by the appointed members from among themselves. The board shall be governed by the provisions of section 12-103 of this charter.

Section 7-105. Powers, Duties and Functions of the Board of Water Supply—The board of water supply shall:

(a) Appoint and remove the manager and chief engineer of the department. He shall be a registered engineer who shall have had a minimum of five years of training and experience in waterworks activities or related fields, at least three years of which shall have been in a responsible administrative capacity.

(b) Fix the salary of the manager and chief engineer.

(c) Have the authority to create and abolish positions.

(d) Determine the policy for construction, additions, extensions and improvements to the water and sanitary sewerage systems of the city which shall include a long range capital improvement program covering a period of at least six years which shall be adopted after consultation with the chief planning officer and which may be amended or modified by the board from time to time.

(e) Have the authority to acquire by eminent domain, purchase, lease or otherwise, in the name of the city, all real property or any interest therein necessary for the construction, maintenance, repair, extension or operation of the water and sanitary sewerage systems of the city. The council shall take no action to acquire real property or any interest therein for the department without the written approval of the board.

(f) Have the authority to recommend to the council the sale, exchange or transfer of real property or any interest therein which is under the control of the department. The council shall take no action to dispose of such property withou the prior approval of the board, and all proceeds from the disposition of such property shall be paid into the special fund of the department.

(g) Have the authority to enter into arrangements and agreements, as it deems proper for the joint use of poles, conduits, towers, stations, aqueducts, reservoirs, trunk interceptors, sanitary sewerage collection systems, sanitary sewage treatment plants and outfall sewers for the operation of any of the properties under its management and control.

(h) Have the authority to issue revenue bonds under the name of "board of water supply".

(i) Modify, if necessary, and approve and adopt annual operating and capital budgets submitted by the manager and chief engineer.

(j) Prescribe and enforce rules and regulations having the force and effect of law to carry out the provisions of this article of the charter, including (1) the regulation of water and sanitary sewerage systems and necessary appurtenances for subdivisions and other properties and requirements for adequate water supply and storage facilities for domestic use and fire protection and adequate sanitary sewerage facilities and systems, (2) the prevention of waste and pollution of water, (3) the manner in which new wells or shafts may be bored, drilled or excavated, cased and capped or recased, (4) the manner in which wells or shafts shall be maintained, controlled and operated to prevent waste of water or the impairment of potability, (5) the limitation to beneficial uses of all water, (6) in time of shortage or threatened shortage of water or of danger to potability of the water of any ground water basin or area by overdraft on such basin, the restriction of the drawing of water

in all wells supplied from such basin on a basis proportionate to the proper and beneficial uses served by them respectively, and (7) other matters having for their object the proper conservation and beneficial use of the water resources available for the city and the protection of health and the prevention of pollution through proper design, construction, operation and maintenance of sanitary sewerage collection, treatment and disposal facilities.

(k) Hear appeals from the order of the manager and chief engineer refusing, suspending or revoking any permit for the sinking, drilling or reopening of any well or shaft for the development of underground water supply.

* * *

Section 7-107. Personnel Administration; Centralized Purchasing; Auditing; Pension—

1. The department shall be subject to he civil service provisions of this charter.

2. The department shall be subject to the centralized purchasing and disposal of personal property provisions of this charter.

3. The department shall come within the purview of the performance audit conducted by the managing director and such audits as may be required by the council.

4. Pensions for officers and employees shall be governed by law.

* * *

Section 7-109. Rates, Revenues and Appropriations—The board shall have the power to fix and adjust reasonable rates and charges for the furnishing of water and for water and sanitary sewerage services, the treatment and pumping of cesspools so that the revenues derived therefrom shall be sufficient to make the department self-supporting. Such revenues shall be sufficient to meet all necessary expenditures, including expenditures for (a) operating and maintenance expenses; (b) repairs, replacements, additions and extensions; (c) accident reserve, pension charges and conpensation insurance; (d) payment of principal and interest on all bonds, including reserves therefor, issued for the acquisition or construction of water and sanitary sewerage works and extensions thereto, and (e) reserve funds under section 7-112 of the charter. All water and sanitary sewerage services furnished to the city or any department thereof shall be charged to the respec-

tive departments and collected at the regular rates established by the board. There shall be no free water or sanitary sewerage services, except as authorized by the State. The board may make appropriations for the purposes states in this section of the charter.

Section 7-110. Public Hearings—The board shall hold public hearings prior to fixing and adjusting rates and prior to the adoption of the budget.

* * *

Section 7-113. Bond Sales—The director of finance, when so directed by the board, shall sell such revenue bonds as may be authorized by the board for the acquisition, construction, replacement, extension or completion of water and sanitary sewerage systems in accordance with the procedures prescribed by law for such sales. The proceeds from such sales shall be kept by the director of finance in a separate fund to be used only for the purposes for which the bonds were sold.

* * *

Section 7-117. Service of Process; Claims—The department may sue and be sued under the name of the "board of water supply, City and County of Honolulu". Service of process in all matters affecting the department or any property under its jurisdiction may be made service upon any member of the board or on the manager and chief engineer. Any action commenced or prosecuted for the recovery of damages for any injury to persons or property by reason of negligence of the board or of any agents or employees of the department, shall be commenced and prosecuted against the department. No action shall be maintained for the recovery of damages unless a written statement verified by oath of claimant, setting forth the nature and items of the claim and the time and place where the alleged injury occurred, has been filed with the department within six months after the date of sustaining the injury.

* * *

Section 7-119. Applicability of Charger Provisions—Except as otherwise provided, no provision of this charter, other than those set forth in this article of the charter, shall be applicable to the department.

5. HAWAII REVISED STATUTES, SECTION 7-1 PROVIDES:

Building materials, water, etc.; landlords' titles subject to tenants' use. Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use. [CC 1859, § 1477; RL 1925, § 576; RL 1935, § 1694; RL 1945, § 12901; RL 1955, § 14-1]

6. STAT. L. KAMEHAMEHA III 81 ET SEQ. PROVIDES IN PART:

PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONS TO QUIET LAND TITLES IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM

When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the lands of four, five or six persons, from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

* * *

All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down.

* * *

It is therefore certain that the tenure was far from being allodial, either in principle or practice; . . . The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land; the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust. But when he put it the hands of a third person, that third person bore a similar relation to him that he did to the King. The superior always had the power at pleasure to disposses his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords.

* * *

Such was the nature of the tenures, and such the titles by which the lands were held, when in 1839 protection was declared both for person and property, in the following words: "Protection is hereby secured to the persons of all the people; together with their lands, their building lots, and all their property." (See Declaration of Rights, p. 10 of translation.)

* * *

It seems natural then, and obviously just, that the King, is disposing of the allodium, should offer it first to the superior lord, that is to the person who originally received the land in trust from the King; since by doing so, no injury is inflicted on any of the inferior lords or tenants, they being protected by law in their rights as before; and most obviously the King could not dispose of the inferior lords or tenants, they being protected by law in their rights as before; and most obviously the King could not dispose of the allodium to any other person without infringing on the rights of the superior lord. But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodium, can no more seize upon the rights of the tenants and dispossess them, than the King can now seize upon the rights of the lords, and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords.

* * *

Although the above facts and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank have generally been the oppressors, and perhaps there are none of those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that Board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights, which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands, are the following:

1st. To punish for high treason by forfeiture, if so the law decress.

2nd. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.

3rd. To encourage and even to enforce the usufruct of lands for the common good.

4th. To provide public thoroughfares and easements, by means of roads, bridges, streets, etc., for the common good.

5th. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.

These prerogatives, powers and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood subject to these conditions.

* * *

Resolution of the Legislative Council

The principles adopted by the Board of Commissioners to quiet Land Titles, under date of August 20th, 1846, having been read before the Nobles and Representatives of the people, in Legislative Council assembled, and having been carefully considered, it was,

Resolved, That the same are hereby approved; and it is enacted that from the date hereof, all claims for landed property in this Kingdom shall be tested by those principles, and according to them be confirmed or rejected.

Kamehameha

Keoni Ana
Council House, Honolulu
Oct. 26, 1846

Office-Supreme Court, U.
FILED
AUG 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1841

In The
Supreme Court of the United States
October Term 1982

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, STATE OF HAWAII,
Petitioner,

vs.

ROBERT S. NAKATA, SEIYU NAKATA, CHARLES F. REPPUN, PAUL REPPUN, CLIFFORD WONG and RACHEL HALL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 82-1841

In The

Supreme Court of the United States

October Term 1982

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, STATE OF HAWAII,

Petitioner,

vs.

ROBERT S. NAKATA, SEIYU NAKATA, CHARLES F. REPPUN, PAUL REPPUN, CLIFFORD WONG and RACHEL HALL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action involves a water rights dispute under Hawaii State law between several farmers and the Honolulu Board of Water Supply. Most of the farmers have been using the waters of the Waihee Stream for over 40 years to irrigate their crops. Beginning in 1955 the Board of Water Supply began diverting water from the source of the Waihe'e Stream on the windward side of the Island of Oahu for municipal purposes. The Board gradually increased its diversions over the years and constructed additional facilities for that purpose until, in 1975, the natural flow of the stream was so greatly reduced that these farm-

ers began to suffer severe crop losses. Upon discovering the cause of their injury, the farmers commenced suit in the Circuit Court of Honolulu to require the Board of Water Supply to limit its diversion of water from the Waihe'e Stream in order to leave sufficient water flowing in the stream for the farmers to irrigate their crops.

After a non-jury trial, the Court granted an injunction to the farmers which required the Board of Water Supply to limit and manage its water diversions so as to leave a minimum of 2.7 million gallons of water per day flowing in the Waihe'e Stream for the farmers' agricultural irrigation requirements. Both sides appealed.

On appeal, the Hawaii Supreme Court held in *Reppun v. Board of Water Supply,* 65 Haw. —, 656 P. 2d 57 (1982), that the farmers were entitled to the full amount of water which they had enjoyed up until the time that they began to suffer injury; the Hawaii Supreme Court remanded the matter to the trial Court to make a determination of the precise amount of water to which the farmers are entitled. The trial Court has not yet ruled upon the remanded issues or fixed the quantity of water to which the farmers are entitled.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Hawaii Supreme Court Is Not Reviewable Since No Final Judgment Has Been Entered.

The Hawaii Supreme Court reversed and remanded this case to the trial Court for further proceedings to make factual determinations and to award whatever relief may be appropriate. The Hawaii Supreme Court stated:

> Therefore, in applying the doctrine the trial judge should first determine the time when the increasing diversion of Waihee Streamwater first harmed the first claimant's taro cultivation. He should next determine what use was actually being made by the public of diverted streamwater just prior to that date. This amount will represent the amount of diversion which, under the public use doctrine, is not enjoinable. Diversion of the remaining water in Waihee Valley which would otherwise flow in Waihee Stream may properly be enjoined. (Footnote omitted.)
>
> 656 P. 2d at 78.

In its present posture, this case is similar to *San Diego Gas & Electric Co. v. San Diego,* 450 U. S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981), in which this Court ruled that it lacked jurisdiction because final judgment had not been entered. Title 28 U. S. C. § 1257 grants jurisdiction to this Court to review only "[f]inal judgments or decrees rendered by the highest Court of a State in which a decision could be had".

Since the Hawaii Supreme Court reversed the decision of the trial Court and remanded the case for further proceedings, there is obviously no final judgment by the highest court of the State of Hawaii. On this ground alone, the writ should be denied.

II. There Is No Conflict Between A Federal Court Of Appeals And The Hawaii Supreme Court.

In 1973 the Hawaii Supreme Court decided the case of *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 504 P. 2d 1330, aff'd upon rehearing 55 Haw. 260, 517 P. 2d 26 (1973), cert. denied 417 U. S. 976, appeal dismissed 417 U. S. 962 (1974). *McBryde* involved a dispute between the sugar

companies over the respective amounts of water that each company had the right to divert from the Hanapepe River watershed. In that case the Hawaii Supreme Court ruled that the sugar companies have water rights, but they do not have the *right* to divert water from the watershed of the Hanapepe River to lands other than the lands to which the water rights are attached. Rather, the Hawaii Supreme Court ruled in *McBryde* that the ownership of surface waters is held in trust for the people of Hawaii for their common good, subject to the rights of all those with use rights to the water. Thus, no private individual owns water, but only has rights to the use of water. It is important to note that the Hawaii Supreme Court did *not* enjoin diversions of water out of the Hanapepe watershed, but only held that the sugar companies could not divert water under a claim of right to do so. Therefore, the Court was not in a position to determine a dispute between the sugar companies as to how much water each had a right to divert.

The sugar companies panicked when the *McBryde* decision was issued, misinterpreting it as holding that they were prohibited from transporting water away from its source for sugar cane cultivation and concluding that the State of Hawaii, through the Supreme Court, had unconstitutionally confiscated their property rights for State use. After certiorari was denied and the appeal to this Court was dismissed, they took their case to the United States District Court where they sued the Governor and other state officials to enjoin the taking of their property. The District Court accepted the sugar companies' interpretation that the *McBryde* case had done more than what the plain language said and concluded that the *McBryde*

decision resulted in a taking of the sugar companies' water rights, even though no injunction had been issued and diversions were not prohibited. The U. S. District Court, in its *de facto* review of the Hawaii Supreme Court's *McBryde* decision, held:

> Those portions of *McBryde I* and *II* holding that the State owns all surplus water and, under the aegis of the English common law doctrine of riparian rights, *restraining* the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant, must be declared untenable and void. *Robinson v. Ariyoshi,* 441 F. Supp. 559, 586 (D. Hawaii 1977), *appeal pending* (Emphasis added).

The U. S. District Court even went on to remand the case to the state trial Court for further proceedings, 441 F. Supp. at 587.

The State of Hawaii appealed the decision of the U. S. District Court to the Court of Appeals for the Ninth Circuit. After hearing oral argument, the Ninth Circuit panel invoked a Hawaii Supreme Court rule and certified six questions to the Hawaii Supreme Court regarding the impact of the *McBryde* decision. The Supreme Court answered those questions in an opinion issued December 29, 1982. *Robinson v. Ariyoshi,* 65 Haw. —, 658 P. 2d 287 (1982). After the decision was issued, the sugar companies filed a Motion for Reconsideration which was denied August 15, 1983.

The Ninth Circuit should determine soon whether or not the *McBryde* decision was an unprecedented reversal of prior law which amounted to a judicial taking. However, at this time there is no conflict between the Court of Appeals for the Ninth Circuit and the Hawaii Supreme

Court which followed the *McBryde* decision in this case. Thus, review is not appropriate under Rule 17 of the Revised Rules of the Supreme Court of the United States.

III. No Substantial "Taking" Issue Has Been Presented.

The Board of Water Supply in this case continues to labor under the sugar companies' interpretation that the Hawaii Supreme Court in *McBryde* took away privately owned water rights and gave them to the State of Hawaii for its own use without just compensation. That interpretation was laid to rest by the Hawaii Supreme Court in answer to the Certified Questions from the Ninth Circuit, as follows:

> *McBryde* merely established that there was no *right* on the part of the plaintiffs to benefit from such diversions. But, as was the case in our pre-existing law governing the transport of water, diversions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint. (Footnote omitted; Emphasis in original).
>
> 65 Haw. at —, 658 P. 2d at 295.

In footnote 8 of the Certified Questions the Hawaii Supreme Court also pointed out that under Hawaii case law going back to 1867, the diversion of water would be enjoined if the diversion injuriously affects the rights of others. Furthermore, the Court cited to Hawaii cases as early as 1904 holding that the party desiring to divert water bears the burden of demonstrating that the transfer will not be injurious to others. 65 Haw. at —, 658 P. 2d at 295. Thus, the *McBryde* holding that a party having water rights does not have a *right* to divert water away

from the land to which the water right attaches was neither startling nor a revolution in water rights law and was not a confiscation of private property rights for state use.

The Board of Water Supply's argument that *McBryde* was a sudden and unexpected change in property rights law is, therefore, unsupportable, since diversion of water was not prohibited and no water rights were taken for public use, as clarified by the Hawaii Supreme Court in its answers to the certified questions.

IV. There Has Been No Taking "For A Public Purpose."

In footnote 9 of its opinion in this case the Hawaii Supreme Court stated, "The ostensible use of private rights by the public is not at issue". In its Petition the Board of Water Supply interprets this language as holding that the Board of Water Supply does not have the rights of a "person" under the Fifth Amendment to the United States Constitution. That interpretation is erroneous. Rather, the Hawaii Supreme Court was pointing out that the water rights involved in the case were not taken "for public use" since the water rights involved are to be awarded to *private* parties and are not being awarded to the State for public use.

The Board of Water Supply refers to Justice Stewart's dissenting opinion in *Hughes v. Washington*, 389 U. S. 290, 19 L.Ed. 2d 530, 88 S. Ct. 438 (1967), and *dicta* in *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1977), for the proposition that judicial action can result in a taking of private property for public use. However, both of those cases involved a claim by the states involved to title and beneficial use of real property. *Hughes* involved a dispute between the State of Washington and a private riparian owner over title to accreted shoreline.

Bonelli involved a dispute between the State of Arizona and a private party over title to a riverbed.

In the present case the dispute is between a semi-autonomous municipal water agency and private farmers; the private parties prevailed on appeal although they must await a decision on remand as to the exact amount of water to which they are entitled. It is, therefore, patently obvious that there has been no taking of private property for a *public use*. If, as the Board of Water Supply argues, it is entitled to treatment as a private "person" then the Hawaii Supreme Court settled a dispute between two private parties and no "public use" issue is raised.

—o—

CONCLUSION

The Petition fails to show that this Court has jurisdiction to hear this case since no final judgment has been entered and it fails to satisfy any of the requirements of Rule 17 of this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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